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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

BROOKS-SCANLON CORPORATION, APPELLANT,
v.
THE UNITED STATES. } No. 367.

THE UNITED STATES, APPELLANT,
v.
BROOKS-SCANLON CORPORATION. } No. 385.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

1. *Pleadings.*—This cause is here on the appeal of the claimant and the cross appeal of the United States. It appears from the petition (p. 5) that the theory on which the suit was brought is that the United States through the Emergency Fleet Corporation under the Act of June 15, 1917 (40 Stat. 183), requisitioned certain property of the claimant on August 3, 1917. While not so specifically alleged, it clearly appears that the property claimed to have

been requisitioned was a contract for building a vessel, made between the claimant's assignor and the New York Shipbuilding Corporation. The claimant alleges that the value of this property was, at the date of requisition, $1,737,120 (p. 5) that it received on account thereof two payments from the Emergency Fleet Corporation, one of $132,922.83, and another of $199,090.04. Both of these payments were made on or about February 24, 1920. The claimant prays judgment for $1,404,118, which is very nearly the difference between the total of the two amounts so paid, $332,012.87, and the alleged value of the property on the date of requisition, $1,737,120. It is further alleged in the petition that the claimant has repeatedly attempted to secure an adjustment of its claim against the United States with the Fleet Corporation, but has failed to obtain any reasonable or just compensation (pages 5 and 6).

The general traverse was entered under Rule 34 (p. 8). Thereby the allegations of requisitioning of property of the claimant were denied and claimant put to its proof.

2. *Findings of fact.*—The findings of the Court below in so far as material may be summarized as follows: On March 28, 1916, a written contract was made between the New York Shipbuilding Company and the East Coast Transportation Company, claimant's assignor, whereby the Shipbuilding Company agreed to construct a steamship of about 8,100 deadweight tons and the Transportation Company agreed to pay the sum of $595,000 therefor in installments,

the ship when completed to be delivered at the dock of the builder on or before February 1, 1918. (Finding II, page 9.)

This contract is incorporated by reference in the second finding and is printed in full at pages 33–36.

On May 24, 1917, the East Coast Transportation Company transferred all its right, title, and interest in this contract to the claimant under its former corporate name, Carpenter-O'Brien Company. (Finding IV, page 10.) Prior to this assignment, the deadweight tonnage was increased to 8,597 tons, and the price to $811,130. (Finding III, page 10.)

On July 11, 1917, the President under authority of the Act of Congress of June 15, 1917 (40 Stat., 182), by executive order, delegated the powers thereby conferred upon him to the Fleet Corporation and Shipping Board. Acting under such authority the Shipping Board requisitioned all power-driven, cargo-carrying, and passenger ships above 2,500 tons deadweight capacity under construction in the yard of the Shipbuilding Corporation, and certain materials, machinery, equipment, and outfit necessary for their completion. (Finding V, page 10.)

The requisition order reads as follows (Findings V and VI, pp. 10, 11):

> UNITED STATES SHIPPING BOARD,
> EMERGENCY FLEET CORPORATION,
> *Washington, August 3, 1917.*
>
> By virtue of an act of Congress approved June 15, 1917, entitled "An act making appropriations for the Military and Naval Establish-

ments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes, and by authority delegated to the United States Shipping Board Emergency Fleet Corporation, under Executive order of the President dated July 11, 1917, all power-driven, cargo-carrying, and passenger ships, above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction, and will prosecute such work with all practicable dispatch.

The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto, and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts.

You will report immediately whether any additional contracts are under consideration

and their character and extent, and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this corporation.

(Signed) W. L. CAPPS,
General Manager United States Shipping Board Emergency Fleet Corporation.
WASHINGTON, D. C., *August 3, 1917.*

Finding 6, pages 11–13, has been amended by a stipulation printed and annexed to the transcript of record (pp. 38, 39). As so amended this finding is to the following effect:

On August 28, 1917, the Fleet Corporation issued and served on the plaintiff, the following letter (page 12):

UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
Washington, August 28, 1917.

CARPENTER–O'BRIEN COMPANY,
8 West 40th Street, New York City.

DEAR SIRS: On August 3, 1917, the United States Emergency Fleet Corporation issued to the New York Shipbuilding Corporation the notice or requisition set forth in enclosure (a).

In response to this communication the New York Shipbuilding Corporation, the shipbuilders, informed us that the East Coast Transportation Company, as owners, or representatives of owners, had entered into a contract with them for the following vessel:

Hull No. 193; type, cargo; D. W. ton., 8,100; date of contract, 3–28–16 (assigned 5–24–17).

Under date of August 23rd you advised that this contract had been assigned to you.

The corporation's district officer having charge of vessels in the district in which the shipbuilders are located has been instructed to take charge, for the corporation, of the completion of vessels now under construction, and has been authorized temporarily to take over your local inspecting officers at their present compensation. Will you please inform the district officer, Mr. G. R. McDermott, at room 302, 1319 F St. NW., Washington, D. C., the names of your representatives and their compensation, sending a duplicate to this office. Your cooperation with the corporation is invited.

The corporation will consider payments to the contractor accruing since the date of requisition upon the receipt of proper vouchers and adequate information to be forwarded through its district officers.

You are requested, as soon as possible, to report to the corporation a statement in detail of the payments already made by you on each ship named above prior to the date of the requisitioning, August 3, 1917. This statement should be accompanied by the original vouchers and receipts and should be verified under oath by the proper corporate officer of your company.

It is the present intention of the corporation to reimburse you promptly, so far as funds are available, for the payments heretofore made to the shipbuilder if after investigation of data submitted by you such payments

are found in order and in conformity with the contract requirements.

At your further and early convenience you are requested to submit to the corporation a statement of such indirect expenditures as you have made on account of each vessel; for instance, the cost of superintendence, original design, interest on funds already paid, and the like. The matters mentioned will require careful audit, and in addition you may submit any other matters you deem pertinent.

It will be perceived that the corporation presumes it is addressing this letter to the owners, or responsible representatives of the owners, or persons entitled to receive compensation on account of the requisition of the vessels listed above. The corporation requests that there be included in your response to this letter all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law.

The consummation of the orders herein and heretofore transmitted will be made the subject of later appropriate corporate action.

Very truly yours,

W. L. CAPPS,
General Manager.

Enclosed in this letter was a copy of the requisition order of August 3, 1917, which is the enclosure referred to as "Enclosure A" in the first paragraph of the letter. This copy of the requisition order was identical with that issued to the shipbuilder on August 3, 1917, and above quoted, with the excep-

tion that it bore date August 28, 1917, and was addressed to "Carpenter-O'Brien Company, re: New York Shipbuilding Corporation." On August 18, 1917, the Fleet Corporation had issued and served on the plaintiff's assignor, East Coast Transportation Company, a duplicate of the letter sent to the Carpenter-O'Brien Company on August 28th, the only changes being in the date and name of addressee. Enclosed in this letter and marked "Enclosure A" was an identical copy of the requisition order which was served on the shipbuilder on August 3, 1917, with the exception that this copy bore date August 18, 1917, and was addressed to "East Coast Transportation Company, re: New York Shipbuilding Corporation."

On August 22, 1917, a letter issued by Admiral Capps, General Manager of the Fleet Corporation to the District Officer, George R. McDermott, was by the latter sent to the Shipbuilding Corporation. This letter states, among other things, that the shipbuilder is informed that the ships under construction at its plant have been requisitioned and title thereto taken over by the United States. The contractor is ordered by the President, represented by the Fleet Corporation, to proceed in the work of completion theretofore ordered, in so far as the contract made prior to August 3rd describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, and classification, including the meeting of the requirements of the contracts in all tests, and in so far as the contract contains provisions for the benefit and

protection of the person with whom the contract was made, *but not otherwise.** (Finding VIII, page 15.)

On December 20, 1917, the shipbuilder, by letter, accepted the order of August 22, 1917, and agreed upon completion of the vessel to deliver a bill of sale thereof without prejudice to the claim of the person or corporation who had originally contracted for the construction of the vessel. (Finding IX, page 16.) On September 13, 1917, the Fleet Corporation instructed the Shipbuilding Corporation by telegram not to accept any further payments from "former owners on account of requisitioned ships." (Finding X, page 16.)

It is further found that the claimant was never in default, and had on deposit sufficient funds to pay all of the installments under its contract with the shipbuilder. (Finding XI, pages 16 and 17.) The court found further that the Shipbuilding Company, upon the execution of the construction contract with the claimant's assignor, in its own name and on its own credit, ordered all the material and equipment, and before August 3, 1917, it made commitments for all the material, etc., needed for the completion of the vessel, that all such materials were duly delivered to the shipbuilder (both before and after August 3, 1917), and used in the construction of the ship, and it is expressly found that—

> The title of these materials was in the New York Shipbuilding Corporation on August 3, 1917, * * * and the plaintiff never had

*Italics ours throughout except as otherwise indicated.

> nor claimed any title in and to these materials either before or after the date of the requisition order. (Finding XII, page 17.)

The court further found that to and including August 3, 1917, between 35% and 40% of the necessary material, valued at about $118,000, and labor at about the amount of $24,000, had been delivered for use and used in the construction of the ship, and on that day the ship was about 19% completed. The ship was thereafter substantially completed by the use of all such material, etc., was launched July 6, 1918, and was delivered to the United States September 20, 1918. (Finding XIII, page 17.)

It is further found that on December 8, 1917, the Fleet Corporation made a contract with the New York Shipbuilding Corporation and the American International Corporation. The portions of the contract, deemed by the court relevant, are set out in the 16th Finding, pages 18 and 20, inclusive. From this contract it appears that ten vessels, of which the one under contract to claimant was one, were under construction, that the parties desired to fix the just compensation of the Shipbuilding Corporation; it was fixed with respect to each ship on the basis of the entire cost of construction—

> figured from the commencement by the Shipbuilding Corporation of the construction of said ten ships up to the times of completion thereof respectively, and in addition thereto, with respect to each ship ten dollars ($10)

> per deadweight ton for profit. There shall be credited, however, in favor of the Fleet Corporation all sums heretofore received by the Shipbuilding Corporation on account of the construction of such ten ships, either from the former owners or from the Fleet Corporation. (Finding XVI, Par. 2, page 19.)

A portion of paragraph 10 of this agreement embraced in the 16th Finding of Fact reads as follows:

> The Fleet Corporation, in accordance with the provisions of the said urgent deficiency act of June 15, 1917, hereby agrees to indemnify and save harmless the Shipbuilding Corporation from any and all loss or liability occasioned by reason of said requisition order of August 3, 1917, or any subsequent acts or orders given by the Fleet Corporation arising out of claims of the former owner or owners or anyone claiming under them.

Incorporated in the contract was a statement of the amount received by the Shipbuilding Corporation from the various persons with whom it had contracted to build the ten vessels specified, including the vessel involved in this suit. The amount received with respect to this vessel was stated to be $419,500. (Finding XVI, page 20.) The court further found (Finding XVII, p. 21) that the plaintiff on August 3, 1917, in accordance with the statute filed a claim for just compensation with the Fleet Corporation for the property alleged to have been requisitioned from it and that on January 23, 1920, the Fleet Corporation adopted a resolution awarding the claimant as just

compensation the sum of $442,683.82. The claimant was notified, declined to accept the award, and the United States paid the claimant 75% thereof, namely, $332,012.87. This award was made up of two items: $177,230.44, the value of the materials in the yard of the Shipbuilding Company at the time of requisition, which materials were then in fact the property of the Shipbuilding Corporation and not of the claimant; $265,453.38 on account of progress payments made by the claimant and its assignor to the Shipbuilding Corporation in excess of cost of material requisitioned. (Finding XVII, page 21.) It is further found that the claimant and its assignors paid the Shipbuilding Corporation $239,500 in cash, $180,000 in notes, and that it made payment of interest on notes of $28,433.33, total principal and interest, $447,933.33. It is also found that the claimant paid $5,500 to architects and furnished plans and specifications of the value of $20,277.25, making in all $473,710.58, and that it has been paid by the defendant the sum of the two payments above mentioned, being 75% of the award, $332,012.87.(Finding XVII, page 21.)

The court further found that if the ship had been completed on August 3, 1917, its value would have been $1,719,400 on that day, that the value of ships, such as the one under construction, on February 1, 1918, the date on which it was to have been completed, was $200 per deadweight ton, that the contract price for building the ship was $831,600, that the plaintiff had paid the sum of $453,433.32, and the

defendant after requisition paid for construction thereof $412,130, making the amount paid for the construction of the ship, $865,563.33, and that the difference between the last-named amount and the value of the completed ship (as of August 3, 1917) is $853,836.67. (Finding XVIII, page 21.)

Upon the facts so found the Court held as its conclusion of law that the plaintiff was entitled to recover from the United States $473,710.58, less $332,012.87, and "as part of just compensation to which it is entitled," interest on $445,277.25 from August 3, 1917, to February 24, 1920—$68,350.06, and interest on $113,264.38 from February 24, 1920, to April 23, 1923, $21,501.35, making in the aggregate $231,549.12 for which judgment was entered. (Conclusion of law, pages 21 and 22.)

The amounts involved in the 17th finding and conclusion of law are for convenience restated in tabulated form as follows:

Credits allowed to plaintiff:	
Total payments by the plaintiff and its assignor to the shipbuilder—	
Cash	$239, 500. 00
Notes	180, 000. 00
Interest on notes	28, 433. 33
Architect's fees	5, 500. 00
Value of plans and specifications	20, 277. 25
Interest on $455,277.25 from Aug. 3, 1917, to Feb. 24, 1920	68, 350. 06
Interest on $113,264.38 from Feb. 24, 1920, to Apr. 23, 1923	21, 501. 35
Total credits	563, 561. 99
Debits:	
Moneys paid on account by United States through Fleet Corporation Feb. 24, 1920	332, 012. 87
Balance to credit for which judgment was entered	231, 549. 12

Judge Hay delivered the opinion (pages 22–28), which was concurred in by Judges Graham, Downey, and Booth. Chief Justice Campbell dissented (dissenting opinion, pages 28–30). The opinion of the Court, after a brief recital of the facts and of the contention of the plaintiff, states (p. 24) that—

> The questions to be determined are: Was there a requisitioning or taking of the contract by the United States, and if there was, what was the value of such contract at the time of the taking?

The court then quotes the provisions of the Act of June 15, 1917, and states (page 25)—

> The intent and purpose of the Shipping Board was, therefore, to requisition ships under construction, which was done in unmistakable language. It is admitted that the ships under construction, the materials, and so forth, in the yard of the New York Shipbuilding Corporation were the property of the corporation, and the title to that property was in the shipbuilding corporation alone. Among the ships under construction so requisitioned was hull 193, which the shipbuilding corporation was building for the Carpenter-O'Brien Corporation, but *it is not contended by the plaintiff that it had any title to or interest in said ship or the materials for its completion.*

The court then cites the decision of this court in *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, and states further (page 26):

> The subject matter in this case was the ship under construction, and that was what the Government requisitioned, not the contract which was the agreement and obligation to perform.

The court says further (page 26):

> The President in taking the ship exercised a power conferred upon him by Congress. If in exercising this power the plaintiff was deprived of any right it may have had under a contract had by it with the person from whom the ship under construction was taken, that does not impose upon the Government an obligation to pay the plaintiff for its right. The deprivation of the right of the plaintiff to have its ship built and delivered to it by the New York Shipbuilding Corporation was incidental to the taking of the ship from its builder and was not a taking of something for public use. * * * In exercising the war powers conferred upon it by the Constitution, Congress has legitimately exercised them in the act of June 15, 1917, and having legitimately exercised them, the injury to the plaintiff is only incidental to their exercise, and it is not entitled to compensation. *Morrisdale Coal Co.* v. *United States*, 55 Ct. Cl. 310 affirmed, 259 U. S. 188; *Pine Hill Coal Co.* v. *United States*, 55 Ct. Cl. 433, affirmed, 259 U. S. 191.

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So far, it is submitted, the opinion of the Court of Claims is entirely in accordance with the law as declared by this court. In the remainder of the opinion, from pages 27 and 28, the court erroneously holds (page 27)—

> When the Emergency Fleet Corporation requisitioned the ship under construction which the shipbuilding corporation had contracted to build for the Carpenter-O'Brien Company, it also took and appropriated, under its order of requisition, the payments which the Carpenter-O'Brien Company had made to the shipbuilding corporation, and also took over the plans and specifications which had been paid for by the last-named company.

The court, assuming (erroneously, it is submitted) that the plaintiff's money was requisitioned, concludes that under the decision of this court in *Seaboard Airline Railway Co.* v. *United States*, 261 U. S. 299, 306, the plaintiff is entitled to interest on the sums requisitioned.

It is submitted that while this conclusion might arguably follow if the plaintiff's money had been requisitioned, it is entirely clear from the findings of fact that the only thing that was requisitioned was the vessel under construction, the equipment and materials assembled for construction, and the commitments or contracts made by the shipbuilder for the purchase and fabrication of such additional materials and equipment as had been ordered for this particular ship at the date of requisition.

First Point.

THE FINDINGS OF FACT CLEARLY SHOW THAT PLAINTIFF'S CONTRACT WITH THE SHIPBUILDER WAS NOT REQUISITIONED.

At the outset we point out that if plaintiff's contentions in this case should prevail and this court should hold (*a*) that plaintiff's contract was, in fact and in law, requisitioned and (*b*) that the just compensation for such requisition is the value of the contract at the date thereof, which is the same as the then value of the ship, which concededly was requisitioned, and (*c*) that plaintiff is entitled to interest upon such value from that date, the United States will in this case be required to pay the plaintiff upwards of $975,000 additional, with interest for over six years (appellant's brief, p. 36). Further that the cases in which Mr. King and others have filed a brief as *amici curiæ* involve several millions more (brief of *amici curiæ*, p. 9), while the amount involved in other similar cases now pending in the Court of Claims is, as justly remarked by this court in the *Omnia Commercial case*, (261 U. S. at 513) "appalling."

It is, therefore, important to note the intent of the Fleet Corporation as evidenced by its action as the delegate of the President under the Act of June 15, 1917.

This action completely negatives plaintiff's contention that its contract was requisitioned. The requisition order of August 3, 1917 states that—

> All power-driven ships under construction in your yard, and certain materials, machinery,

equipment, and outfit and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

* * * * *

The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

You will furnish immediately general plans and detail specifications of the ships requisitioned and copies of contracts and all supplemental agreements in reference thereto, and full particulars as to owner, date of completion, and payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligation of the Emergency Fleet Corporation in taking over these ships and contracts. (Quoted in full page 11, Finding VI, in part page 10, Finding V.)

The order is explicit in its specification of the property requisitioned: "ships, materials, machinery, equipment, and outfit" and "commitments for materials, machinery, equipment, and outfit necessary for their completion."

While the order refers to "contracts requisitioned" and to "ships and contracts taken over," the contracts here referred to are clearly, from the context, the commitments (necessarily by contract) for the materials, etc.

Until August 18, 1918, the Fleet Corporation had no dealings (so far as the record discloses) with plaintiff or its assignor.

On that day the Fleet Corporation wrote to the plaintiff's assignor, East Coast Transportation Company, a letter which is quoted in full on pages 12–13, Finding 6. The material portions of this letter read as follows:

> On August 3, 1917, * * * the Fleet Corporation issued to the New York Shipbuilding Corporation the notice or requisition set forth in Enclosure A.

Enclosure A, as appears from the stipulation of December 27, 1923 (record, pages 38 and 39), is a copy of the requisition order.

The letter continues:

> In response to this communication the New York Shipbuilding Corporation, the shipbuilders, informed us that the East Coast Transportation Company, as owners or representatives of owners, had entered into a contract with them for the following vessel.
>
> Hull No. 193; type, cargo, D. W. ton 8,100; date of contract 3–28–16 (assigned 5–24–17) * * *. You are requested as soon as possible to report to the Corporation a statement in detail of the payments already made by you * * * prior to the date of the requisitioning August 3, 1917 * * *. It is the present intention of the Corporation to reimburse you, so, after funds are available for the payments heretofore made to the shipbuilder, if after investigation of data submitted by you, such payments are found in order and in conformity with the contract requirements * * *. It will be perceived

> that the Corporation presumes it is addressing this letter to the owners or responsible representatives of the owners or persons entitled to receive compensation on account of the requisition of the vessels listed above. The Corporation requests that there be included in your response to this letter all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law (page 12).

On August 28, 1918, an identical letter and enclosure were sent to the plaintiff (stipulation pages 38 and 39). The Court of Claims found as a fact, Finding VII, that—

> On August 27, 1917, the Carpenter-O'Brien Corporation (plaintiff) forwarded to the Emergency Fleet Corporation a list of payments to the Shipbuilding Company as paid under requirements of the construction contracts, which statement was identical with that theretofore presented by the shipbuilding company to the Fleet Corporation on August 16, 1917, and as set forth in the contract between the Emergency Fleet Corporation and the New York Shipbuilding Corporation, dated December 8, 1917.

This contract is found as a fact and the material parts thereof are embodied in the sixteenth finding (pages 18–20). It seems clear from the facts so found that the Fleet Corporation had no intention of requisitioning the plaintiff's contract and that both as matter of fact and of law it did not requisition the same, and that this intention and action were clearly

understood by the plaintiff at the time. It does not in any way appear from the findings that the plaintiff then contended that its contract was requisitioned. On the contrary the effect of the portion of the Seventh Finding above quoted is that the plaintiff acquiesced in the requisition of the ship by the Fleet Corporation and furnished, as requested, a statement of the amounts which it had paid to the shipbuilder in apparent reliance upon the intention of the Fleet Corporation to reimburse it for such expenditures.

While by a subsequent contract of December 8, 1917, the United States through the Fleet Corporation agreed with the shipbuilding company that it should be credited under the terms of the construction contract then made with the amounts paid prior to August 3, 1917, by the plaintiff, these amounts of money were in no sense of the word requisitioned from the shipbuilder, much less were they requisitioned from the plaintiff. As between the Shipbuilder and the United States the latter agreed to indemnify the shipbuilder against the claim of the plaintiff. As between the United States and the plaintiff, the former stated in the letter of August 28, 1917, above quoted, that it was its intention to reimburse the plaintiff for all amounts paid by plaintiff to the shipbuilder as soon as such amounts should be ascertained. This intention was carried out by the Shipping Board when it made an award to the plaintiff of the moneys which it had actually paid to the shipbuilder, and in addition also for the increase in the value of materials assumed to have been purchased

with these particular moneys, but it is clear that the United States did not requisition anything whatsoever from the plaintiff.

Messrs. William B. King and others have filed a brief as *amici curiæ*. The statement on page 3 of this brief that the Fleet Corporation on August 18th and 28th served the requisition order on claimant's predecessors is no longer an accurate statement in view of the stipulation (printed at pages 37 and 38 of the record) by which the clerical error and omission in the 6th Finding of the Court of Claims are corrected. The requisition order was not served upon the claimant's predecessors, but was enclosed for their information in a letter under date of August 18 and enclosed in a similar letter to the plaintiff under date of August 28th.

Monongahela Navigation Co. v. *United States*, 148 U. S. 312, is relied on by plaintiff. It is clearly distinguishable for there the property was taken. In that case at page 337, this court said:

> So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take it is subject to the constitutional limit of just compensation. It should be noticed that here there is unquestionably a taking of the property and not a mere destruction. It is not a case in which the government requires the removal of an obstruction. What difference would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the govern-

ment in the exercise of its sovereign power, takes the property.

This distinction is further developed in the course of the opinion, at pages 338, 340, 341, by the full discussion and distinction of the case of *Bridge Company* v. *United States*, 105 U. S. 470.

Second Point.

THIS CASE IS CONTROLLED BY THE DECISION OF THIS COURT IN OMNIA COMMERCIAL CO. *v.* UNITED STATES, 261 U. S. 502.

That case has been so recently decided that it is unnecessary to discuss it at length further than to say that the Act of Congress under which the steel was requisitioned from the Allegheny Steel Company was either the act of June 15, 1917, here involved (40 Stat. 182–183, C. 29) or the Act of March 4, 1917 (39 Stat. 1193, C. 180), and that at the time of the requisition of the steel from the steel company the plaintiff or its assignors had paid large sums to the Steel Company on account of the purchase of the steel and had sold the same to responsible parties, and from these sales would have realized a profit of nearly a million dollars (page 503). The Act of March 4, 1917, referred to, under the caption "Naval Emergency Fund" contained provisions similar but in an abbreviated form, to those subsequently enacted by the Act of June 15, 1917, but it was provided that the authority thereby granted to the President of requisitioning, etc., should cease on March 1, 1918. These pro-

visions were amplified to continue in force until six months after the proclamation of the Treaty, by the Act of June 15, 1917.

In the *Omnia Commercial* case this court says (261 U. S. at 508),

> A question is raised as to the statutory authority of the officer who made the order of requisition and gave the directions respecting noncompliance with the contract to bind the Government, but for the purposes of the case, we assume he was authorized, as he could have been under 39 Stat. 1193, sec. 180, or 40 Stat. 182–183, sec. 29.

Recognizing the authority of the decision of this court in the *Omnia Commercial case,* the appellants attempt to distinguish it upon the theory that in the case at bar the contract was kept alive, because at the date of requisition, August 3, 1917, the shipbuilder was directed to proceed with the construction of the vessel and because subsequently and on December 8, 1917, the Fleet Corporation made a three-party contract with the shipbuilder and the American International Corporation whereby among other things the shipbuilder agreed to complete this hull and nine others (specified at page 18 of the record). It is, however, immaterial that a similar or even identical contract was subsequently made. The shipbuilder became bound to the United States by the covenants of this new contract and not by the covenants of the original contract with plaintiff.

In view of the decision of this court in the *Omnia Commercial case* we do not deem it necessary to refer in detail to the Norwegian Arbitration. The conclusions of the arbitration tribunal were before this court for consideration in the *Omnia Commercial case*, and in that case this court held directly to the contrary. Nor is it necessary to discuss the decision of the Court of Kings Bench in *Mercy Docks and Harbor Board* vs. *The Lord Commissioners of the Admiralty*, cited at pages 23–25 of appellants' brief. The recent consideration by this court of this same question in the *Omnia Commercial case* renders it unnecessary for us to discuss in detail the authorities claimed in the brief referred to to be contrary to that decision.

THIRD POINT.

IF THE ACTION WERE MAINTAINABLE ON THE THEORY OF REQUISITION OF PLAINTIFF'S CONTRACT, THE JUDGMENT SHOULD BE REVERSED AND THE CLAIM DISMISSED, BECAUSE AT THE DATE OF THE ALLEGED REQUISITION THE CONTRACT WAS WITHOUT VALUE.

There is no finding in the case to sustain the plaintiff's contention that it is entitled to a larger award of compensation than was made by the Court of Claims. While it is true that the court finds as a fact that the value of the ship, if completed on August 3, 1917, would have been upwards of $1,700,000.00, it by no means follows that even if the theory of just compensation for a requisition contract were applied to this case that the contract would then have had any such value, or indeed any value at all.

The amount of just compensation to which a plaintiff is entitled when his property is taken for public use is the market value of the property at the date of taking. The court may properly take judicial notice of the historical fact that on August 3, 1917, or within a few days thereafter every ship of over 2,500 deadweight tons capacity was requisitioned by the Fleet Corporation in behalf of the United States under the Act of June 15, 1917, by requisition orders substantially identical with the one issued to the shipbuilder in this case. Under these circumstances it can hardly be properly contended that the contract had any market value, for it was a contract impossible of performance. It may be that if there had been a free market and the ship had then been completed, the ship would have had this value, but the Court of Claims does not find as a fact that the contract on the date of requisitioning of the ships was of any value.

The court may, however, properly take judicial notice of the further historical fact that, at or about the time of the requisitioning of these ships, all shipbuilding material throughout the United States was likewise requisitioned by the Government, and particularly all steel and the entire steel industry were requisitioned, and no private shipbuilder was permitted to acquire any steel for shipbuilding for any but Government ships. Assuming then merely for the argument that there is a basis for the plaintiff's contention that the shipbuilding contract was requisitioned, the contract at the date

of requisition was valueless because it could not be performed by the shipbuilder.

L. Vogelstein & Company, Inc., v. *United States*, 262 U. S. 337–341. *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188; *Pine Hill Company* v. *United States*, 259 U. S. 191.

The theory of the plaintiff confounds the subject matter of the contract with the covenants of perfomance.

Fourth Point.

THE COURT BELOW ERRED IN ALLOWING INTEREST (PARTLY COMPOUNDED) ON THE THEORY THAT THE PAYMENTS MADE BY THE PLAINTIFF TO THE SHIPBUILDER WERE REQUISITIONED.

If this were a case where private property had been taken for public use it may be conceded for the argument that the decision of this court in the *Seaboard Airline Railway Company case, supra*, would require an allowance of the award of some amount in addition to the value of the property taken, which additional amount would represent the damage suffered by the plaintiff through the delay in the receipt of the just compensation to which he was theoretically entitled upon the taking of his property. In the case at bar, however, as has been pointed out, it was the property of the shipbuilding company, namely, the ship under construction, the materials assembled for construction, and the additional materials under contract for such construction which were requisitioned and not the plaintiff's contract. While the

statute provides that in cases of cancellation of contracts as well as in cases of requisitioning of property the United States shall make "just compensation" therefor, and while this court has held in the *Seaboard Airline Railway Company case* that just compensation under the Fifth Amendment includes damages for delay, yet the term "just compensation" in the Act is obviously used in the constitutional sense of the word only in cases which come within the Amendment—that is to say, where the United States takes property, whether the property be a ship, material, or a contract.

As is pointed out by the opinion of this court in the *Russell Motor Car Company case*, the terms "modify" and "suspend" relate more properly to such contracts as the United States might itself make for ship construction, etc., than to contracts made prior to the date of requisition of a ship by the shipbuilder with a private purchaser. As further held in that case, the word "cancel" applies not only to contracts made between private individuals and shipbuilders for the construction of vessels but also to contracts made by the United States. Obviously from the necessities of the case the power of cancellation with respect to private contracts related to the governmental activities for the prosecution of the war during the period of active hostilities, while the power to cancel government contracts related rather to the period after the termination of hostilities, and from then until six months after the proclamation of the Treaty of Peace. As is further pointed out in the *Russell Motor Car*

case, the power of modification of a contract (except with the consent of the contracting parties) must be intended to relate to government contracts and not to private contracts, for it is difficult to conceive how the power of the government, even during war, could be exerted so as to compel individuals to modify contracts and to abide by them as modified.

The power to suspend contracts may equally well relate to private contracts as to government contracts. Occasion might well arise where the necessities of the government during the war would require the performance of a private contract to be suspended without it being necessary to order its cancellation. Similarly, on the termination of hostilities a vast number of governmental contracts were, by order of the Fleet Corporation, suspended until such time as it might be ascertained whether the necessities of the government would require performance on the one hand or cancellation on the other.

In all these instances of cancellation, suspension, and modification, it is clear that there would be no taking of private property for public use, there would be merely governmental action authorized by the Constitution and necessary or suitable for the prosecution of the war, or in relation to the cessation of hostilities, and the consequent necessity of relieving the government from the enormous obligations imposed by war-time contracts when it was evident that the property contracted for would no longer be required. Hence, it is submitted

that in all instances of cancellation and suspension of private contracts, such as the cancellation in the case at bar, the party for whom the contract was being performed did not have his property taken but the property was rendered valueless. In such a case, the right to sue the United States in the Court of Claims is not one founded on the Constitution—that is to say, a right to recover just compensation for private property taken for public use—but is a right founded solely on the terms of this statute, which provides that in all cases where private contracts are canceled the United States shall "make just compensation therefor." The further provisions of the act read that—

> If the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as added to said seventy-five per centum will make up such amount as will be just compensation therefor in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

As the statute provides that the person shall be entitled to sue the United States under Section 145 of the Judicial Code, it is submitted that all other sections of chapter 7 of the Judicial Code relating to the Court of Claims must be applicable, including section 177, by which the Court of Claims is

prohibited from awarding interest. In the case at bar the Court of Claims held in substance that the United States requisitioned the plaintiff's money. This was clearly erroneous, as the title to the money passed from the plaintiff to the shipbuilding company at the time the money was paid. The United States did, however, by the requisition order of August 3, 1917, cancel the plaintiff's contract with the shipbuilder. Thereupon the plaintiff was out of pocket by the amount which it had paid to the shipbuilder. It may have had a valid cause of action against the shipbuilder for the repayment of this money. If so, the United States agreed to indemnify the shipbuilder against this claim, but under the terms of the statute the claimant was given the statutory right to be awarded just compensation for the cancellation of the contract. This right, however, was statutory, not constitutional, and, as the property of the plaintiff was not requisitioned or taken for public use, there is no sound theory of law on which it can be held as was held in the *Seaboard Air-line Railway case* that the suit in the Court of Claims should be regarded as the continuation of a condemnation proceeding initiated by the requisitioning or the taking of the property. The cause of action, therefore, on which the plaintiff might have sued, but did not, is based on cancellation of its contract with the shipbuilder, and as the plaintiff was given by the United States the right to prosecute this cause of action only in the Court of Claims or (within the jurisdictional limit of $10,000) in the district court

exercising the same jurisdiction as the Court of Claims, it must follow under the decisions of this court that Congress intended, by referring the case to the Court of Claims, to subject itself only to such judgment as the Court of Claims has power to render in other cases—that is to say, for the amount of the principal sum without interest.

The Merchant Marine Act, 1920, gave the Shipping Board the power to award just compensation, which by the Act of June 15, 1917, had been given to the President. The provisions as to suit in the Court of Claims were retained. Subsequent to the passage of the Merchant Marine Act, Congress by the Internal Revenue Act of 1921 (Act November 23, 1921, 42 Stat. 227, 316) amended Section 177 of the Judicial Code to read as follows:

> SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws.

The passage of this act, after that of the Merchant Marine Act of June 5, 1920, with the specification of one class of cases only in which interest may be

allowed (other than contracts "expressly stipulating for the payment of interest") is a further indication of the intent of Congress that interest shall not be allowed by the Court of Claims in cases, such as the case at bar, of cancellation of private contracts.

In *United States* v. *Bayard*, 127 U. S. 251, this court held that even in a case where a portion of moneys which had been awarded to a claimant were withheld by the Secretary of State and invested so as to produce an income, the claimant was entitled only to the principal and the claim for the income or interest must be disallowed. Similarly, in *United States* v. *North Carolina*, 136 U. S. 211, the bonds issued by the State under authority of its statutes contained a provision that they would bear interest from date "until the principal be paid." The statute, however, did not authorize interest beyond the due date of the bonds. This court held that under the principle that the sovereign does not pay interest except pursuant to an Act of its Legislature or by a lawful contract of its executive officers, interest was not allowable.

So in *Tillson* v. *United States*, 100 U. S. 43, Congress had referred a claim to the Court of Claims to investigate "and ascertain the amount equitably due as damages for an alleged breach of contract." It was contended that the use of the word "equitably" was intended to award interest, but this court, at page 46, held directly to the contrary. The whole topic has been elaborately examined by this court in an opinion written by Mr. Justice Brandeis in *United*

States v. *North American Transportation and Trading Company*, 253 U. S. 330. In that case this court held that where private property is taken for public use without a condemnation proceeding and the owner sues the United States, the cause of action is not founded upon the Fifth Amendment but on the existence of an implied contract entered into by the United States, and that the contract which is implied is to pay the value of the property as of the date of the taking. On this point the court says at page 336:

> Interest may not be added because § 177 of the Judicial Code, reenacting § 1091 of the Revised Statutes, declares that—
>
> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. *Tillson* v. *United States*, 100 U. S. 43."

It is submitted that the provisions of the act of June 15, 1917, negative the implication that it was the intention of Congress that in suits in the Court of Claims based on cancellation of contracts interest should be allowed. Obviously, if the claimant had accepted the full amount of the award made by the Shipping Board, that is, for the sums paid by the plaintiff to the shipbuilder, the claimant's acceptance of the principal would have barred its claim to the interest. *Stewart* v. *Barnes*, 153 U. S. 456. Here the claimant has accepted 75% of the award, yet the court below has allowed in-

terest not only on the remaining 25% but on the 75% from the date of requisition of the ship, August 3, 1917, to the date of the payment on February 24, 1920. This allowance of interest has been made despite the fact that the moneys of the claimant were not requisitioned at the date of requisitioning of the ship, and also despite the fact that the amount on which interest has been computed by the Court of Claims includes not only the $180,000 of notes which the plaintiff gave to the shipbuilder, but also interest on these notes to date of maturity. The interest on the notes to date of maturity has been added to the principal and interest has been allowed on this amount from August 3, 1917. The practical effect is that, on a substantial part of the claim, compound interest has been allowed—an allowance which is, of course, wholly without justification.

Fifth Point.

THE JUDGMENT BELOW, TO THE EXTENT THAT IT AWARDED THE BALANCE OF THE SUMS PAID BY PLAINTIFF TO THE SHIPBUILDER CAN BE SUSTAINED ONLY ON THE THEORY THAT PLAINTIFF, UNDER THE STATUTE, WAS ENTITLED TO COMPENSATION FOR THE CANCELLATION OF ITS CONTRACT.

We have referred to the pleadings in the Statement of Facts above because they show clearly that the whole theory of the plaintiff's case is that the United States requisitioned the plaintiff's contract, not the moneys paid to the shipbuilder, but the contract which the plaintiff had with the Shipbuilding Com-

pany, on the date of requisition of the ship, August 3, 1917. On this theory the plaintiff contends that it is entitled to the value of the contract on the day the ship was requisitioned. There is no claim here for an award of just compensation based on the cancellation of the contract. On the contrary, the plaintiff submitted its case to the court below on the theory of requisition and assigns error on the same theory. (See Appellant's brief, page 12.) The position of the Government is that while, as a matter of fairness and justness, the plaintiff should (in a suit brought on a proper theory), recover without interest the balance of the amounts which it paid to the shipbuilder for construction of the ship and for which amounts the Government received credit on its contract with the shipbuilder, it is not entitled to any allowance or award of judgment upon the theory adopted, namely, "requisition," and the Government submits to the court for determination the question as to whether upon this branch of the case where a claimant sues in the Court of Claims upon the theory of requisition, and the Court of Claims awards judgment on this theory, the judgment can be sustained upon another and inconsistent theory, namely, that of cancellation—a theory which, if adopted by the plaintiff, would have required the Court of Claims to award judgment for only the balance of the amount paid by the plaintiff to the shipbuilder without interest, an amount less than that awarded and tendered by the Shipping Board but refused by plaintiff.

It is not the desire of the Government to deprive the plaintiff of an award to which it is fairly entitled, but it is submitted that there is grave doubt as to whether the plaintiff is entitled to such award when he has proceeded upon a wholly different and inconsistent theory both in the court below and in this court. If this appeal had been taken by the plaintiff in a court in which the rules of pleading are followed, there could be little question but that the judgment below should be reversed on the appeal of the United States because it was not sustainable on the theory adopted by the plaintiff.

It is further submitted that the findings of the Court of Claims that the plans and specifications in the contract were ordered and paid for by the plaintiff and its assignors and were used after August 3, 1917, for the benefit of the Fleet Corporation (Finding 15, page 18), is inconsistent with the shipbuilding contract, Claimant's Exhibit 4, printed at pages 33–37 and embodied by reference in the 2d Finding, page 10. This contract expressly provides in the covenants that the contractor agrees to build a steamer—

> to be in all respects a duplicate of the Steamship *William O'Brien*, built at the yard of the contractor, and delivered to the owner about April 17, 1915, and the plans and specifications of the said Steamer *William O'Brien* are hereby referred to and form part of this agreement.

Reading these two findings together, the plaintiff did not furnish to the shipbuilder any new plans or

specifications, nor did the United States, through the Fleet Corporation, requisition any plans or specifications. They did not cost the shipbuilder anything, nor did they cost the plaintiff anything with respect to the vessel requisitioned in this case. The amount allowed for these plans, etc., is $20,277.25 with interest at 6 per cent. This allowance is unjustifiable. While it is found as a fact in Finding 17 that—

> The plaintiff also paid the sum of $5,500 to architects. The plaintiff also furnished plans and specifications of the value of $20,277.25.

It is submitted that this further finding with respect to the plans and specifications does not negative the effect of the contract between the plaintiff and the shipbuilder—that these plans had been furnished to the shipbuilder by plaintiff's assignor, East Coast Transportation Company, in connection with the building of another vessel.

The award made by the Fleet Corporation to the plaintiff on January 23, 1920, was excessive. A wrong theory was adopted and instead of allowing the plaintiff the amount of actual advances, namely, $419,000, the Fleet Corporation made an additional award of $23,183.82. The Court of Claims found that the total payments made by the plaintiff and its assignors were as follows:

Cash	$239, 500. 00
Notes	180, 000. 00
Interest on Notes	28, 433. 33
Total	447, 933. 33

It appears, however, from the contract, Plaintiff's Exhibit 4, page 33, that all of the notes were to

mature on February 1, 1918, the date fixed by the contract for the completion and delivery of the vessel, and that these notes were then to be refunded by serial coupon bonds (page 34). It is submitted that the compensation to which the plaintiff is entitled is the amount of money or its equivalent paid at the date of cancellation, August 3, 1917, without interest, and that the United States should no more be required by the judgment of the Court of Claims to pay interest on the notes than to pay interest on the amounts of cash agreed to be paid amounting, under the terms of the contract (to and including the installment due June 1, 1917), to the amount found by the Court of Claims as having been paid in cash, namely, $239,500. The plaintiff was required by its contract to make two additional payments of $45,000 each on July 1st and August 1st, 1917, and these payments or their equivalent were (apparently) not made. The total of notes given for the corresponding period was $100,000 (four notes at $25,000 each). In addition a note was apparently given for $80,000 representing part of a cash payment due of $90,000, and the plaintiff, by the judgment of the court below, has recovered interest which it paid on notes which it gave to make good a deficit in the cash payments required to be paid by the contract.

It further appears from the Seventh Finding (p. 14) that on August 27, 1917, plaintiff stated to the Fleet Corporation that the amount paid was the same as that subsequently fixed by the contract of December 8, 1917, between the shipbuilder and the

Fleet Corporation, namely, $419,500 (see Finding XVI, p. 20, Par. X).

Consequently under the findings, the plaintiff, if entitled to recover on the theory of cancellation, should have had judgment for only the amount of cash advanced, without interest, to August 3, 1917, namely, $419,500, plus the $5,500 paid for architects' fees (Finding XVII, p. 21); in all $425,000, less paid on account by Fleet Corporation February 24, 1920, $332,012.87; balance, $92,987.13.

It is settled by the recent decision of this Court that in a cancellation case the plaintiff is not entitled to anticipated profits.

In *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, in which the amount of just compensation to which claimant was entitled under this same statute, with respect to a contract with the United States cancelled by the Secretary of the Navy, was involved, this Court says at page 523:

> It is contended, further, that even if the action of the Secretary of the Navy was warranted by the statute the Car Company was nevertheless entitled to have included as just compensation its anticipated profits.
>
> This contention confuses the measure of damages for breach of contract with the rule of just compensation for the lawful taking of property by the power of eminent domain. In fixing just compensation the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the Car Company

> if it had been fully performed. * * * The contract we must assume was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties. The lower court was right in refusing to allow anticipated profits * * *.

CONCLUSION.

The judgment should be reversed and the claim dismissed unless the Court should hold that plaintiff is entitled on the pleadings and findings to judgment on the theory of cancellation. In that event the cause should be remanded to the Court of Claims with instructions to disallow the interest and the amount allowed for plans and specifications, and to enter judgment for $92,987.13, which sum, together with $332,012.87, the amount paid to the plaintiff before the action was brought, is the amount actually invested by it in the ship which was taken.

JANUARY 7, 1924.

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Supreme Court of the United States

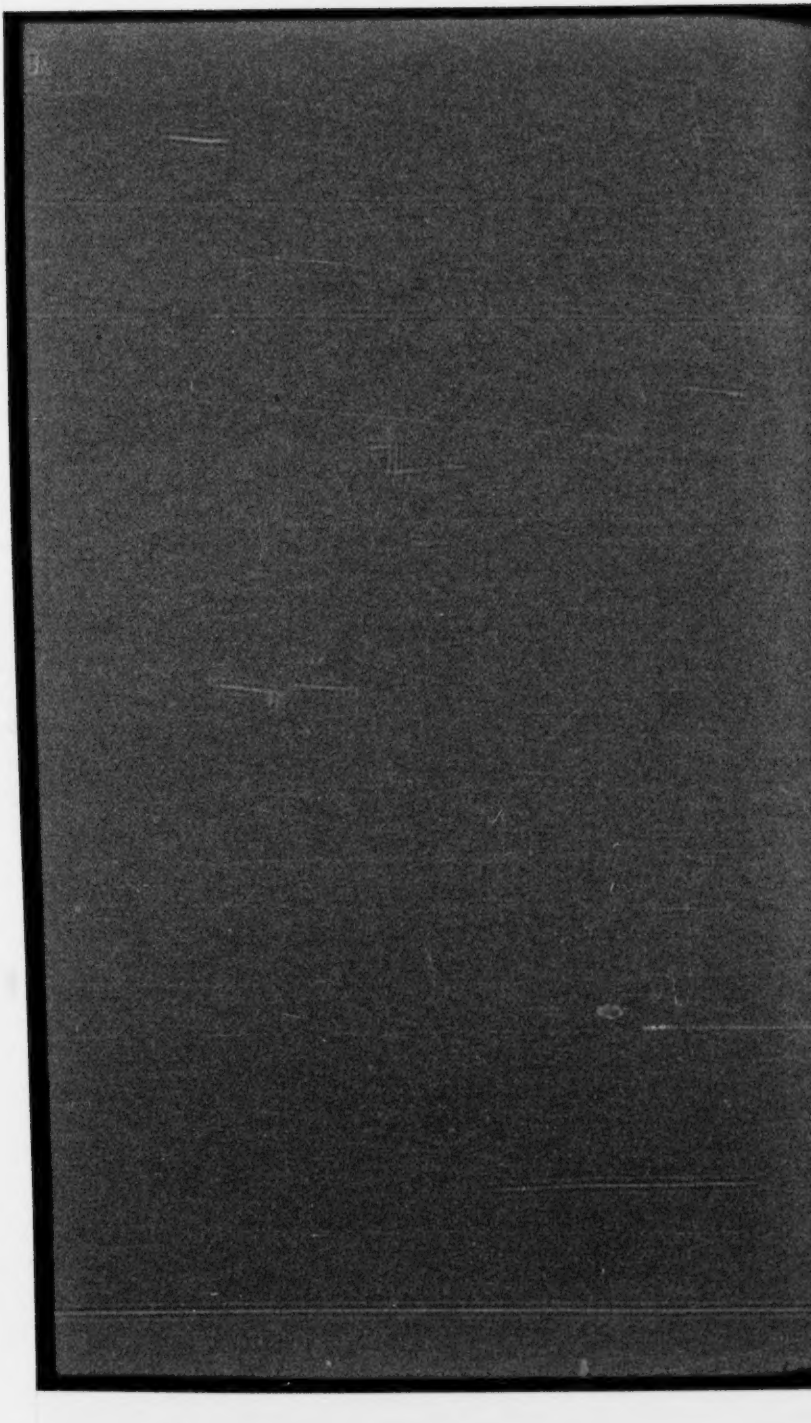
OCTOBER TERM, 1923.

BROOKS-SCANLON CORPORATION,
Appellant,
v.
THE UNITED STATES.
No. 307

THE UNITED STATES,
Appellant,
v.
BROOKS-SCANLON CORPORATION.
No. 385

CROSS-APPEALS FROM THE COURT OF CLAIMS.

BRIEF SUBMITTED BY
CHARLES S. HAIGHT, T. M. CUNNINGHAM, JR., WILLIAM B. KING, JOHN J. FITZGERALD, and WHARTON POOR,
AS *AMICI CURIAE*.



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Supreme Court of the United States,

OCTOBER TERM, 1923.

BROOKS-SCANLON CORPORATION, Appellant, *v.* THE UNITED STATES.	No. 367.
THE UNITED STATES, Appellant, *v.* BROOKS-SCANLON CORPORATION.	No. 385.

BRIEF SUBMITTED BY

CHARLES S. HAIGHT, T. M. CUNNINGHAM, JR., WILLIAM B. KING, JOHN J. FITZGERALD and WHARTON POOR,

AS *AMICI CURIAE* ON BEHALF OF

COMPAGNIE GENERALE TRANSATLANTIQUE, OCEAN STEAMSHIP COMPANY OF SAVANNAH, CONSORZIO VENEZIANO DI ARMAMENTO E NAVIGAZIONE and LUCKENBACH STEAMSHIP CO., INC.

SUPPORTING BROOKS-SCANLON CORPORATION,

Appellant in No. 367 and Appellee in No. 385.

Brooks-Scanlon Corporation will be referred to as claimant and the United States as defendants.

Statement of the Case.

The facts governing the determination of this case are the following:

1. Claimant's predecessor on March 28, 1916, contracted with the New York Shipbuilding Company to build it a vessel according to agreed plans and specifications, the vessel to be delivered February 1, 1918 (Findings I, II, rec. p. 9; contract, rec. p. 33).

2. In August, 1917, the value of a vessel such as that contracted for was substantially twice the contract price (Finding XVIII, rec. p. 21).

3. Long before August 3, 1917, substantially all of the material, equipment and outfit needed to complete the ship had been ordered by the Shipbuilding Corporation (Finding XII, rec. p. 17), and on August 3, 1917, between 35 and 40 per cent of the necessary material, machinery, outfit and equipment had been delivered to the Shipbuilding Corporation, and the ship was about 19 per cent completed (Finding XIII, rec. p. 17).

4. On August 3, 1917, the United States Shipping Board Emergency Fleet Corporation served on the New York Shipbuilding Corporation an order of which the material parts are as follows (Finding V, rec. p. 10):

> "All power-driven cargo-carrying and passenger ships, above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.
>
> "On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction and will

prosecute such work with all practical dispatch.

"The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

"You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto, and full particulars as to the owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts."

On August 18 and 28, the Fleet Corporation served the same order on claimant's predecessors except that its first two paragraphs read as follows (Finding VI, rec. pp. 11, 13):

"all power-driven cargo-carrying, and passenger ships above 2,500 tons d. w. capacity, under construction in your yard, and certain materials, machinery, equipment, outfit, and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

"On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch."

5. The statute authorizing this action was the act of June 15, 1917, Ch. 29 (40 Stat. 182) which, as quoted by the Court below (p. 24), empowered the President:

"(b) To modify, suspend, cancel, or requisition any existing or future contract for the

building, production, or purchase of ships or material.

* * * * * *

"(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed, or any part thereof or charter of such ship."

The Act also contained the following provisions:

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor."

* * * * * *

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time."

In the Executive Order of July 11, 1917 (not in this record but printed in the Official Bulletin for July 13, 1917, Vol. I, No. 54, p. 1, and in "Emergency Legislation, passed prior to December, 1917," p. 173, Gov't Pr'tg Office, published under the direction of the Attorney-General) the

President directed that "the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof."

6. On August 22, 1917, a copy of a letter, from the Fleet Corporation to its District Manager was sent by the latter to the New York Shipbuilding Corporation. The material parts of this letter are as follows (Finding VIII, rec. pp. 14-15):

> "Referring to the vessels under construction in the yard of New York Shipbuilding Corporation, Camden, N. J., requisitioned under the corporation's order of August 3d, precedent to the final examination of the contract for the vessels in question, you are requested to inform the shipbuilder as follows:
>
> "The ships now under construction at your plant and referred to above having been requisitioned by the duly authorized order of this corporation and title thereto taken over by the United States, and an order having been placed with you by due authority to complete the construction of said ships with all practicable dispatch, you are further ordered by the President of the United States, represented by this corporation, to proceed in the work of completion hertofore ordered, in conformity with the requirements of the contract, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification, and survey thereof, in-

cluding the meeting of the requirements of the said contract and all tests as to efficiency and capacity of the ship on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise.

* * * * * *

"For the work of completion heretofore and herein ordered the corporation will pay to you amounts equal to payments set forth in the contract and not yet paid: * * * Compensation to the shipbuilder for expedition and for extra work will, when deemed appropriate, be made the subject of a subsequent order."

On August 28, 1917, the Fleet Corporation addressed a letter to claimant's predecessor of which the material parts are as follows (Finding VI, rec. p. 12):

"The corporation's district officer having charge of vessels in the district in which the shipbuilders are located has been instructed to take charge, for the corporation, of the completion of vessels now under construction, and has been authorized temporarily to take over your local inspecting officers at their present compensation. * * *

"The corporation will consider payments to the contractor accruing since the date of requisition, upon the receipt of proper vouchers and adequate information to be forwarded through its district officers.

"You are requested, as soon as possible, to report to the corporation a statement in detail of the payments already made by you on each ship named above prior to the date of the requisitioning, August 3, 1917. * * *

"It is the present intention of the corporation to reimburse you promptly, so far as funds are available, for the payments hereto-

fore made to the shipbuilder if after investigation of data submitted by you such payments are found in order and in conformity with the contract requirements.

"At your further and early convenience you are requested to submit to the corporation a statement of such indirect expenditures as you have made on account of each vessel; for instance, the cost of superintendence, original design, interest on funds already paid, and the like."

On September 13, 1917, the Shipbuilding Corporation was forbidden by the Emergency Fleet Corporation to accept further payment from "former owners" on account of requisitioned ships and the claimant was forbidden to make further payments (Finding X, rec. p. 16).

7. The vessel was completed and delivered to the United States September 20, 1918, substantially as previously specified. The vessel was constructed out of material, machinery and equipment ordered long before August 3, 1917, and delivered at the prices fixed in such orders. "No further material was purchased subsequent to August 3, 1917, except for the sum of $31,000 for material used for the construction ordered for the military protection of the ship." (See Findings XII, XIII, rec. p. 17.)

8. On December 8, 1917, the New York Shipbuilding Corporation and the Emergency Fleet Corporation entered into an agreement reciting that contracts had been made between the Shipbuilding Corporation and former owners for constructing vessels named; that due to war conditions, these prices had proved to be less than cost; that these ships and all materials for them were requisitioned on August 3, 1917; that the

Shipbuilding Corporation by such requisition was directed "to complete such ships on behalf of the United States." This agreement stipulated payment for all such vessels at cost, plus $10 a deadweight ton profit and indemnified the Shipbuilding Corporation from claims of the former owners (Finding XVI, pp. 18-20). In this contract the Fleet Corporation credited itself with the progress payments previously made by the claimant.

9. By reason of the requisition, claimant lost its contract right to the delivery to it, upon payment of the contract price, of a vessel worth $1,719,400 (Finding XVIII, rec. p. 21).

10. The Fleet Corporation allowed claimant as just compensation $442,683.82 (Finding XVII, rec. p. 21). The Court of Claims allowed claimant the amount of its progress payments, and the value of its plans, specifications and other incidentals, amounting in all to $473,710.58 (Finding XVII, Conclusion of Law, rec. p. 21). No allowance was made by either authority for the requisition of the contract (opinion, pp. 22-28). Campbell, C. J., was of the opinion that such an allowance should have been made (dissenting opinion, pp. 28-30).

On February 24, 1920 payment was made according to statute (act of June 15, 1917, Ch. 29, 40 Stat. 183) of seventy-five per centum of the amount awarded by the Shipping Board (Finding VII, p. 21). Upon suit brought for the excess claimed, the court below having found a larger sum due than that awarded by the Shipping Board, rendered judgment for the difference between that sum and the amount paid (Finding XVII, rec. p. 30). It also awarded judgment for interest on the entire sum found due by it from August 3, 1917, to February 24, 1920, and upon that sum, less the

amount paid on February 24, 1920, to the date of judgment (Conclusion of Law, rec. pp. 21-22).

The question at issue on claimant's appeal is whether, under the Act of June 15th, 1917, or under the Constitution, the government must compensate the claimant for the value of its contract or may appropriate the entire benefit of that contract and merely return to the claimant its progress payments plus the cost of its plans and specifications.

The right to interest is the issue arising upon defendant's appeal.

The Interest of the Amici Curiae in this Appeal.

The Compagnie Generale Transatlantique, the Ocean Steamship Company of Savannah, the Consorzio Veneziano di Armamento e Navigazione, and the Luckenbach Steamship Company, on whose behalf this brief is submitted, are shipowners whose steamers were requisitioned under the same circumstances as was that of the claimant, and whose right to compensation may be governed by the outcome of this appeal.

The only difference between the case at bar and those of the owners above named is that the Brooks-Scanlon Corporation did not, under its contract, become possessed of legal title to the materials in the yard as the instalments were paid whereas, in each of the other contracts it was provided that legal title should pass. It is not believed, however, that this difference entitles the present claimant to a smaller measure of compensation. (See *infra*, p. 40).

The preparation of a somewhat detailed brief has been felt to be justified, not merely on account of the amounts involved, but also because of the

important constitutional question which is raised and because of the fact that an affirmance of the decision of the Court of Claims will be equivalent to a finding that the decision of the Hague Arbitral Tribunal in an arbitration between the Kingdom of Norway and the United States, was totally erroneous (see *infra,* pp. 20-23). We feel sure that this Court would not declare a decision of the Hague Arbitral Tribunal erroneous except after giving the case the most careful consideration.

ARGUMENT.

FIRST POINT.

The Contract was Requisitioned.

Principles Settled by this Court.

Omnia Commercial Co. v. *United States,* 261 U. S. 502, the principal authority relied upon by the government, leads, we believe, directly to the conclusion that the claimant is entitled to compensation for the value of its contract. This court there stated the facts as follows, pp. 507-508:

> "The appellant, on May 19, 1917, by assignment, became the owner of a contract, by which it acquired the right to purchase a large quantity of steel plate from the Allegheny Steel Company, of Pittsburgh, at a price under the market. The contract was of great value and if carried out would have produced large profits.
>
> "In October, 1917, before any deliveries had been made, the United States Government requisitioned the Steel Company's en-

tire production of steel plate for the year 1918 and directed that company not to comply with the terms of appellant's contract, declaring that if an attempt was made to do so the entire plant of the Steel Company would be taken over and operated for the public use.

"Appellant brought an action in the Court of Claims alleging in addition to the foregoing, that by the orders of the Government the performance of the contract by the Steel Company had been rendered unlawful and impossible; that the effect was to take for the public use appellant's right of priority to the steel plate expected to be produced by the Steel Company and thereby appropriate for public use appellant's property in the contract."

Two principles are announced by the court, as follows, p. 508:

"The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 690; *Cincinnati* v. *Louisville & R. R. Co.*, 223 U. S. 390, 400, and if taken for public use the Government would be liable.

"But destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense."

The latter principle is then illustrated and summarized as follows, p. 508:

"There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of buildings, destruction of diseased cattle, trees, etc., to prevent contagion—but for which no remedy is afforded. Contracts in this respect do not differ from other kinds of property."

The opinion then proceeds as follows, p. 510:

> "The conclusion to be drawn from these and other cases which might be cited is, that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy."

P. 511:

> "In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended."

After considering a number of cases, the Court says, p. 513:

> "In the present case the effect of the requisition was to bring the contract to an end, and not to keep it alive for the use of the Government.
>
> "The Government took over during the war railroads, steel mills, ship yards, telephones and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things."

The principles thus clearly reasoned have an equally clear application *per contra* in the present case. Under the facts above summarized, to be discussed in detail in the argument, "the effect

of the requisition" was not "to bring the contract to an end," but "to keep it alive for the use of the government." There was "appropriation" of the contract, not "frustration." The principles stated in the *Omnia* opinion lead just as directly to allowance of the claim in this case as they did to its refusal there.

During the war and even after the Armistice, the United States made many regulations which interfered with, and in some cases wholly frustrated, executory contracts between private parties. Exports were embargoed, the output of factories was requisitioned, and individuals and corporations were forbidden to do many things which they otherwise might have done freely. The Government obviously did not become liable, under the provisions of the Fifth Amendment, for the incidental loss arising therefrom.

Appropriation, Not Frustration.

The essential differences between the two cases will now be pointed out.

In the *Omnia* case, this court said, p. 511:

> "In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order."

In the present case the Government recognized its privity with claimant by giving claimant notice of requisition and by paying for what it admittedly took. In the former case there was no requisition; in this case a requisition is admitted and the only question is: What was taken?

The principle laid down in the *Omnia* case, that the mere "frustration" of contracts creates no right to compensation is not questioned, but every case of the destruction or cancellation of a contract is not one of frustration. When there *is* an admitted taking (as here of the unfinished ship), which taking itself destroys a valuable right connected with the thing taken, then full compensation is required and neither the *Omnia* case nor any other decision of this Court holds that the owner of the property so taken is entitled to less than the price at which he could have sold his *entire interest* in the property appropriated or that he must accept less than the damage sustained by him through the taking.

The Requisition Order.

The formal requisition order (rec., pp. 10, 11, 13) declares in its first paragraph that all "ships" of given classification "under construction in your yards" are requisitioned. This is by no means a final declaration that nothing but ships was requisitioned. The scope of the entire instrument is to be determined by examining the whole of it.

In *Omnia Commercial Company,* as quoted above, the test between appropriation or frustration of a contract is whether "the effect of the requisition was to bring the contract to an end" or "to keep it alive for the use of the government." The next paragraph of the order gives the direct response to this test.

> "On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.

> "The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned."

All information must be furnished necessary to determine the

> "obligations of the Fleet Corporation in taking over these ships and contracts."

These provisions expressly acknowledge the requisitioning of the contracts as well as of the ships. The order "to complete the construction of said requisitioned ships under construction" asserts the right of the Fleet Corporation as the substituted owner under the requisitioned contracts.

The contracts were kept "alive for the use of the government."

Fleet Corporation to Shipbuilder, August 22, 1917.

The contemporaneous action of the Fleet Corporation confirms this and is wholly inconsistent with the opposite view. The letter of the Fleet Corporation of August 22, 1917 (rec. pp. 14-15) ordered the Shipbuilding Corporation

> "to proceed in the work of completion heretofore ordered, in conformity with the requirements of the contract, plans and specifications, under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification, and survey thereof, including the meeting of the requirements of the said contract and all tests as to efficiency and capacity of the ship on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise.

> "For the work of completion heretofore and herein ordered the Corporation will pay to you amounts equal to payments set forth in the contract and not yet paid."

The contract contained a guaranty by the shipbuilder against defects developing within three months (rec. p. 36). This is an instance of a provision for the benefit of the owner. Advantage could be taken of that provision only by taking the contract; it must have been lost had the contract not been kept "alive for the use of the Government."

The two paragraphs above quoted cover the whole of the contract obligations; the first calls for the performance, for the Fleet Corporation's benefit, of all provisions made for the owner's benefit in the original contract; the second accepts for the Fleet Corporation the obligations for payment assumed by the owner in the original contract. These provisions together show that the effect of the requisition was not "to bring the contract to an end" but "to keep it alive for the use of the government." The dissenting opinion correctly says (rec. p. 29):

> "Here we find a recognition of the contract and a direction to proceed according to its provisions. * * * These [the vessels under construction] were requisitioned, they were to be completed according to the provisions of the contracts under which they had proceeded to their stage of completion, and payment was to be made upon the basis of the balance due under the contracts."

This letter from the Fleet Corporation to the Builder was part of the original appropriation. It was the immediate definition by the Fleet Corporation of its own order. There could hardly be

a stronger case for the application of the principle stated by this court in *United States* v. *Mason & Hanger Co.* 260 U. S. 323, 325, which applies precisely if we merely change the word "contract" to "requisition":

> "What is the import of this practical interpretation? The Government does not contend that the words of the contract were dictated by statute. They are, therefore, the words of the contracting officer to express and provide for the purpose of the Government in exercise of the duty with which he was charged and used as a declaration and measure of the rights and obligations of the parties to the contract. His subsequent conduct is necessarily to be considered a definition of them. The officer in a sense is a party to the contract, not only representing but speaking for the impersonality of the Government. Competent, therefore, it would seem, to declare the meaning of the contract."

Fleet Corporation's Attitude to Claimant.

The letter of August 28, 1917, to claimant's predecessor (Finding VI, rec. p. 12) presents the appropriation of the contract from the opposite position. Claimant had made payments to the shipbuilder. Upon requisition, the Fleet Corporation assumed the owner's obligation for future payments, assured claimant of its intention "to reimburse you promptly * * * for the payments heretofore made to the shipbuilder" (rec. p. 12), forbade acceptance of "further payments from former owners on account of requisitioned ships" (September 13, 1917, Finding X, rec. p. 16) and offered as an item of payment to claimant the sums already paid by it (Finding XVII, rec. p. 21). This means that the Emergency Fleet Corporation appropriated to its bene-

fit the payments made by the original owner to the date of requisition, and claimed, as between itself and the shipbuilder, the full benefit of this part performance of the contract previously made by the owner. It took the owner's place under the contract. No such position could have been taken by the Emergency Fleet Corporation unless it had, in fact, requisitioned the contract between the original owner and the shipbuilder.

Complete Assumption of Owner's Place.

By the action above discussed, the Fleet Corporation assumed the position previously occupied by claimant toward the Shipbuilding Corporation and relieved the claimant of the obligations which its previous occupation of that position had involved. It thus completely appropriated the contract.

And the Government *meant* to get the benefit of the contract, as to assembly of material, orderly continuance of procedure, construction already completed, contract price already paid and balance of contract price to be paid. It *intended* to keep the contract alive because what the Governernment wanted was ships and that was the only way to get them promptly.

Difficulty has arisen only because, in settling with owners, the learned counsel for the Fleet Corporation have overlooked one most important detail,—that claimant's rights under the contract were of much more value than the instalments which had been paid to the Builders up to August 3, 1917. "Just compensation" is based on value and not on cost (*United States* v. *New River Collieries Co.*, 262 U. S. 341; *Vogelstein* v. *United States*, 262 U. S. 337).

Contract Between Fleet Corporation and Shipbuilder.

The Fleet Corporation on December 8, 1917, made an agreement for increased compensation with the Shipbuilding Corporation (rec. p. 18). This recites the contract price and says:

> "Due to war conditions, such contract prices have proved and will prove to be less than the actual cost of constructing ships."

This relieved the shipbuilder of all possibility of loss under the requisition.

It was a radical change of position. Under the original proceedings in August, the government secured the benefit of the original contract both as to design and price. The requisition made a change of parties only; this contract, originally between claimant's predecessor and the New York Shipbuilding Corporation, became one between the Emergency Fleet Corporation and the New York Shipbuilding Corporation. The latter parties then negotiated other terms of payment only for their contract. Obviously this could not affect claimant's rights, which had been settled by a transaction months earlier.

But even this agreement (sub-paragraph II, rec. p. 19) shows that the government took the work done up to the date of requisition substantially at the contract price (cost plus $10 a ton), rather than at the greatly enhanced value of August 3, 1917 (Finding VIII, rec. p. 21).

The Fleet Corporation actually received the benefit of all the previous orders for material under the original contract, at the original prices, and the vessel was built of these materials (Findings XII, XIII, p. 17).

Summary.

The conclusion is inevitable that the building contract originally owned by claimant was in fact taken over by the Emergency Fleet Corporation, which subsequently exercised rights which could be claimed only by the owner of the contract.

The above reasoning may be succinctly summarized in the dissenting opinion of the learned Chief Justice of the Court of Claims (rec. p. 30):

> "If the plaintiff had voluntarily assigned its contract with the builder to the Government, and the latter had expressly assumed the unfulfilled obligations and later received the completed vessel, it would not more effectively have acquired plaintiff's contract, its rights, and obligations than actually resulted from what was done in this case. The Government requisitioned the incomplete vessel with the purpose of requiring the completion in accordance with the existing contract; it did require the carrying out of that contract (with slight modification); it took plaintiff's right to have the vessel; it received the vessel and appropriated plaintiff's partial payments thereon to its own use and benefit. The contract was performed; the vessel was delivered. I think the plaintiff's contract was taken and appropriated."

Precedents.

Norwegian Arbitration.

An exact precedent for the present case is found in the adjudication of the Norwegian claims (Sen. Doc. 288, 67th Cong. 4th Sess.). A special tribunal of arbitration was created by the agreement with Norway, signed June 30, 1921 (42 Stat. Part 2, p. 1925), in accordance with the Hague Convention of October 18, 1907 (36 Stat. Part 2, p. 2199),

and the General Arbitration Convention with Norway of April 4, 1908 (35 Stat. Part 2, p. 1994).

The facts there were parallel to those in the present case, as to existing contracts for ship construction, issuance of requisition orders and later construction. The Arbitration Tribunal decided as follows:

P. 11:

> "The order contained in the letter of August 3d expressly requisitioned not only the ships and the material, but also the contracts, the plants, detailed specifications and payments made, and it even commandeered the yards (depriving them of their right to accept any further contracts). In spite of this the United States have contended that there was no requisition except of 'physical property' and have strongly maintained that the word 'contract' in the letter of August 3d only referred to commitments for material. (U. S. case Appendix, p. 212, etc.)"

P. 17:

> "There were several successive changes in the personnel of the leading technical and legal advisers of the Corporation and among the directors themselves, and these changes apparently resulted in a change of policy. * * *
>
> "The Corporation seemed to have forgotten that it had assumed certain contractual obligations, and in particular to have ignored the fact that the retention of the money of the claimants without restoring the ships was obviously unlawful. Such action was not only contrary to international law, but also to the municipal law of the United States. * * *
>
> "The Tribunal is, therefore, of opinion:
>
> "1. That whatever the intentions may have been the United States took, both in fact and in law, the contracts under which the

ships in question were being or were to be completed.

"2. That in fact the claimants were fully and forever deprived of their property, and that this amounts to a requisitioning by the exercise of the power of eminent domain within the meaning of the American Municipal Law."

The weight of authority of international tribunals in like cases in domestic tribunals has not often been discussed. It is obvious that in matters of international scope arising out of conditions of war they should be highly persuasive. It is not a desirable condition that American citizens should receive from their own tribunals, existing under the Constitution and laws of this Government, a smaller measure of recognition of private right than foreign subjects have received under pressure of a decision of a tribunal governed by a neutral umpire.

It is true that in the diplomatic note to the Norwegian Minister forwarding a draft for the amount found due by the Arbitrators, the Secretary of State included a protest against certain features of that award, but that protest was confined to two specific points:

(1) that the award sought to distinguish between the property of neutral aliens and the property of nationals which distinction was considered unsound;

(2) that the award failed to give a satisfactory explanation of the methods of calculation applied or of the reasons for determining upon the amounts awarded in each case (Amer. Journal of International Law, for April, 1923, Vol. 17, p. 287).

No protest whatever was made to the ruling that the building contracts were in fact taken and on this point the award is a precedent of the highest international court in favor of the claimant.

British Rule.

The law in Great Britain is in accord with the decision of the Norwegian arbitration. In *Mersey Docks & Harbour Board* v. *The Lord Commissioners of the Admiralty*, L. R. 1920, 3 K. B. 223, a firm of shipbuilders had agreed on December 4, 1914, to build a barge and to deliver her on or before October 1, 1915, for £22,700. After delays due to war conditions, she would have been completed in April, 1917. The admiralty requisitioned her on February 8, 1917. In February, 1919, the builders offered to duplicate the barge for £63,000, subject to increase or decrease of material and labor which would have resulted in a cost of £70,000. The duplicate could not have been completed before the spring of 1920. The Board, p. 227, claimed the difference between the original contract price and the replacement price. The Admiralty claimed, pp. 228, that the measure of compensation should be the difference between the contract price and the value of the vessel when taken. The Admiralty did not make the contention made here, that the contract was not taken. The sole dispute was as to the measure of the value of the contract thus taken. The Arbitrator submitted the question, p. 229:

> "(i) Whether the Board is entitled to recover the difference between the contract price of barge No. 798 and the cost of replacing her, regard being had to the fact that replacement was impossible at the date of the

act complained of and continued impossible for several years?"

Lord Reading, C. J., said, p. 232:

"The first of these questions is whether the Board is entitled to recover the difference between the contract price of the barge and the cost of replacing her, regard being had to the fact that replacement was impossible, at the date of requisition and continued impossible for several years. The Board seek compensation for the loss of their barge measured and ascertained by the difference between the original contract price and the price they would now have to pay to replace the barge." * * *

P. 233:

"On a broad view of the facts and without undue regard to minute details, the Court has to determine upon what principle the compensation to be awarded to the Board ought to be measured. In my judgment it is sufficient for the purpose of this case to say that the Board are entitled to have the property which, but for the action of the Admiralty, would have been in their possession in April 1917, replaced by the Admiralty. As it can not be replaced except by the expenditure of money, they are entitled to the amount of money which will represent the cost to them of the replacement. That must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labor and materials which has continued up to the present time. The first question put up by the arbitrator should, I think, be answered in the affirmative. I can see no very material difference between the respective principles contended for by counsel on behalf of the Board and counsel on behalf of the Admiralty. In truth, I think

that both these principles lead to the same conclusion. * * * Whichever course we follow it seems to me that we must arrive at the same result."

It is thus clear that, had the present case arisen in Great Britain, there would have been no question about the award of damages claimed here.

Allanwilde Transportation Corporation v. *Vacuum Oil Co.*, 248 U. S. 377.

In the previous discussion of *Omnia Commerical Co.* v. *United States* (*supra*, p. 10) we have set forth what we believe to be the principles clearly indicated by this court as applicable to a case of actual requisition. The distinction between the *taking* of a contract and its mere frustration is again clearly illustrated in *Allanwilde Transportation Corporation* v. *Vacuum Oil Co.*, 248 U. S. 377. There a voyage of a sailing vessel through the war zone was prevented by an embargo promulgated by the United States. That was a typical case of the frustration of a contract through making its performance illegal. The shipper of the cargo loaded on the *Allanwilde* had paid his freight in advance, just as in the case at bar advance payment had been made under the building contract. But just because the Government, in that case, had taken nothing, it made no demand upon the owner of the vessel to perform the charter and, as a matter of course, it claimed no credit for the prepaid freight. The embargo which merely made performance *impossible* created no relation of any kind between the United States and the parties to the contract. And it must always be true that when a contract between private parties is merely frustrated by governmental action, the government assumes no

rights or obligations under the contract. In such a case the original parties alone are interested and the question of what is to become of previous payments is governed solely by the terms of their agreement. In the case at bar, when the United States credited itself with the advance payments and ordered the completion of the vessel as per specifications and at the contract price, it asserted that the contract was alive and had been assigned (under the statute) to it. That was the only way in which it could become entitled to credit itself with those payments and secure the benefits of the contract.

The Decisions of this Court on the Taking of Contracts.

Even in instances where there is no statutory provision requiring the payment of just compensation when a contract is cancelled, nevertheless it has been held by this Court, and by many other courts, that physical property, the value of which is enhanced by rights based on contract, cannot be taken over under the power of eminent domain without compensating its owner for the value of the contract as well as for the value of the physical property. Indeed, the Constitution requires payment for such contract rights, even though the statute authorizing the payment of compensation, expressly denies it.

In *Monongahela Navigation Company* v. *The United States,* 148 U. S. 312, the United States had taken over, by its power of eminent domain, Lock and Dam No. 7 belonging to the Monongahela Navigation Company.

The Monongahela Company had been incorporated by the State of Pennsylvania in 1836 and

had been granted by a Legislature of that state the right to construct dams and locks upon the River Monongahela. The result of the construction of these dams and locks was to greatly increase the commerce carried upon that river and the tolls received by the company were exceedingly valuable. In passing the statute providing for the condemnation of Lock No. 7, however, Congress expressly provided that in estimating the sum to be paid by the United States "the franchise of said corporation to collect tolls should not be considered or estimated." On the trial of the case, the physical value of the lock and dam was found to be $209,393.52, without taking the franchise into consideration. The company contended that notwithstanding the provision of the Act of Congress, the value of the franchise must be taken into consideration and that the value of Lock No. 7 was $450,000.

It was held by this Court that the company's franchise was its contract with the state, was the property of the corporation, and that the United States *could not legally take over the physical property of the corporation without compensating it for the value of its contract as well as for that of the actual physical property.* This Court said: P. 329:

> "In the case of *Montgomery County* v. *Schuylkill Bridge Co.*, 110 Pa. 54, 58, in which the condemnation of a bridge belonging to the bridge company was sought, the court said: 'The bridge structure, the stone, iron and wood was but a portion of the property owned by the bridge company, and taken by the county. There were the franchises of the company, including the right to take toll, and these were as effectually taken as was the

bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of the franchises. The latter can no more be taken without compensation than can its tangible corporal property. Their value necessarily depends upon their productiveness.' * * *

P. 337:

It would seem strange that, if by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice. * * *

P. 343:

It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; *that it only appropriates the tangible property and then either makes the use of it free to all, or exacts such tolls as it sees fit or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it.* The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual

> from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived." (Italics ours.)

In this case the United States was compelled to pay compensation for the franchise, that is, for the contract between the canal company and the State of Pennsylvania, as well as for the actual physical property, even though the statute expressly provided that the franchise should not be taken into consideration in fixing the compensation.

The case holds, directly, that the United States cannot take over property and pay merely the physical value thereof, but must also make compensation for contract rights which are incidental to that property and which make its market value greater than that of the physical property separately considered. The language in the paragraph of the opinion last quoted overrules the very argument made by the government in this case.

It will be argued that the *Monongahela* case cannot be relied on as an authority because, it will be said, that decision rested on estoppel. (See *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 264; *Lewis Bluepoint Oyster Co.* v. *Briggs,* 229 U. S. 82.) The element of estoppel was involved in the *Monongahela* case only to the extent that Congress, having authorized the construction of the dam, was held not entitled to destroy its value, even for the purpose of improving navigation, without making compensation therefor. On

the general principles by which compensation is to be measured, the *Monongahela* case has been cited with approval in the most recent decision of this court on the subject, *United States* v. *New River Collieries,* 262 U. S. 341 at pp. 344 and 345.

Since the decision in the Monongahela case it has been held, repeatedly, that physical property can not be taken by eminent domain without compensating the owner for all franchise or contract rights appurtenant thereto.

In *New York Telephone Co.* v. *State of New York,* 169 App. Div. 310, affd. 218 N. Y. 738 (1915), part of a telephone line owned by the Telephone Company was "taken" by the State for the purpose of constructing a reservoir as a necessary incident to the State barge canal. The State, of course, took the telephone line not for the purpose of operating but to destroy it.

In holding that the Telephone Company was entitled to compensation not only for the loss of its physical property but also for its franchise, the Court said:

P. 318:

> "Not only do the Constitutions of the United States (14th Amendt. Sec. 1) and of the State of New York (Art. 1, Sec. 6) forbid the taking of private property for public use without just compensation, but 'in the case of *Sinnickson* v. *Johnson,* 17 N. J. L. (2 Harr.) 129, 145, cited in the case of *Pumpelly* v. *Green Bay Company,* 13 Wall. 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be

said to exist not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, Chancellor KENT affirmed substantially the same doctrine.' (*Monongahela Nav. Co.* v. *United States, supra.*)

"It must be held, therefore, that the appropriation by the State was not merely of claimant's franchise rights within the flow line of the reservoir, leaving its structural property practically valueless, but of all its property within such limits, *corporeal and incorporeal, constituting an indissoluble combination of property,* and that the claimant is entitled to be awarded just compensation therefor." (Italics ours.)

In *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, where the City had brought proceedings to condemn the property of the Water Co. and a question was raised as to the effect of these proceedings upon the Water Company's contract with the town of New Lots, this Court, after pointing out that "the contract is a mere incident to the tangible property" (p. 690) continued:

"The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it as they do the tangible property of the company to public uses." (166 U. S. at p. 691.)

See also

Los Angeles v. *Los Angeles Gas Company,* 251 U. S. 32.

Willcox v. *Consolidated Gas Co.,* 212 U. S. 19 at p. 44.

Monongahela Water Co.'s Case, 223 Pa. 323.

Belleville v. *St. Clair County Turnpike Co.,* 234 Ill. 428.

The technical argument made for the Government treats this claim to compensation as if it involved an unwarranted restriction of the Government and an unmerited favor to the individual, but this is far from the truth.

The right to compensation when private property has been taken or destroyed by Governmental action, is not an exception, but the rule. The loss should not be allowed to fall with crushing weight upon some particular individual, but should rather be distributed among all those for whose benefit the sacrifice is made, so that the share of each will be so light as hardly to be noticeable.

And where property has been taken full compensation must be made. In a recent decision this Court said:

> "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles, and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. He is entitled to the damages inflicted by the taking." (*Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, at p. 304; citations omitted.)

In *Boom Company* v. *Patterson*, 98 U. S. 403, this Court held that the fact that certain islands in the Mississippi River were peculiarly suited for the construction of a boom was one of the matters which must be given effect to when fixing compensation for their taking.

This Court said:

P. 407:

> "In determining the value of land appropriated for public purposes, the same consid-

> erations are to be regarded *as in a sale of property between private parties.* The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. * * *

P. 408:

> As a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." (Italics ours.)

And in the same case this Court approved the statement that the proper inquiry was, "What is the value of the property for the most advantageous uses to which it may be applied?" (98 U. S. at p. 410.)

In *United States* v. *New River Collieries,* 262 U. S. 341, the United States had requisitioned upwards of 60,000 tons of bituminous coal which its owner had shipped, for export, to Hampton Roads, Virginia.

Following the above authorities this Court held that the Collieries Company was entitled to the market value for *export* coal at the time of the taking. The opinion contains a most valuable discussion of the obligations of the United States to compensate the owner of expropriated property, but is, unfortunately, too long to quote *in extenso,* and too closely knit to allow the selection of extracts. It should, however, be noted that this Court said that the owner was entitled to "be put

in as good position pecuniarily as it would have occupied if its property had not been taken" (p. 343); and that, "the owner cannot be required to suffer pecuniary loss" (p. 345). The *Monongahela* case and *Boom Co.* v. *Patterson* are cited with approval and this Court condemns (what the Court of Claims has done in the case at bar) the fixing of compensation at what the property cost the claimant and not at its market value. The decision of the Court of Claims, it should be explained, was handed down before *U. S.* v. *New River Collieries* was decided.

Conclusions Under First Point.

The following conclusions result from the foregoing discussion:

(1) The requisition of August 3, 1917, and other contemporaneous action show the purpose of the Fleet Corporation not to bring this contract to an end but to keep it alive for the use of the government.

(2) The discrimination made in *Omnia Commercial Co.* v. *United States* between frustration and appropriation equally places that case on the side where relief is denied and this on the side where relief is granted.

(3) The relief claimed here was granted in an identical case by an international tribunal of the highest authority and in a closely parallel case by a high British tribunal.

(4) Allowance should be made to claimant for the value of its entire interest in the contract on August 3, 1917, the date of requisition.

SECOND POINT.

If This Contract Was Not Requisitioned, It Was Cancelled and Just Compensation Is Due Therefor.

If it is not clear to the court that this contract was requisitioned, the following is insisted upon as sound:

(a) The President (act of June 15, 1917, *ante*, p. 3) was authorized to modify, suspend or cancel, as well as to requisition, a contract.

(b) If either was done, just compensation was granted by the same statute.

(c) If this contract was not requisitioned, it was cancelled.

(d) Just compensation is due for the loss arising from such cancellation.

The Fleet Corporation definitely forbade the further performance of the contract by ordering the shipyard not to receive, and the claimant not to make, any of the further payments due thereunder. This showed an unmistakable and intentional cancellation of the contract.

While the constitutional provision requires "just compensation" only for property "taken" it is not uncommon that statutory relief is granted for damage which might not amount to a technical "taking." For instance, in *United States* v. *Alexander*, 148 U. S. 186, this court held that the United States was bound to pay for the value of a well which had dried up in consequence of a public work being carried on in the vicinity. The statute in that case provided for compensation to any person who "shall be directly injured in any property right." The statute was held sufficient

to cover Alexander's loss even if the Fifth Amendment did not apply.

The present case is a similar instance. Congress knew that the shipyards of the United States were crowded with ships under construction for domestic and foreign shipowners. The obvious purpose was to give the President a free hand and to allow him in each case to requisition the contract or cancel it or suspend it as he saw fit. But no matter whether the contract was requisitioned and utilized or was merely cancelled, it was provided that the Government "shall make just compensation therefor." The question of payment was not left to discretion. It was peremptorily required.

The definite purpose of Congress to pay the injured party, whether the contract was modified, suspended, cancelled or requisitioned is conclusive in the present case if the Court finds that the claimant's contract was either requisitioned *or* cancelled. Indeed, the mere granting of authority to requisition a contract was recognized in the *Omnia* case as a fact of marked importance. In that case this Court said (p. 514):

> "In Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, *the statute providing for condemnation expressly included contracts* and these were in fact taken and compensation therefor specifically allowed." (Italics ours.)

The taking in that case arose from the fact that the water mains and hydrants were physically taken, and the franchise *thereby* destroyed which, *mutatis mutandis*, is the precise finding contended for by the Government in the case at bar.

THIRD POINT.

Even if allowed nothing for the value of its contract, the claimant is, nevertheless, entitled to an award much greater than that fixed by the Court of Claims.

It is believed that much of the confusion which has been evident in the discussion of this whole question as to the requisition of ships under construction has arisen from a failure to carefully analyze the facts before seeking to apply the law. From the very beginning of the dispute between the owners and the long procession of counsel who have spoken for the Fleet Corporation, it has been insisted that under the President's executive order the building contracts were *not* requisitioned and that *therefore* the Government took only the plates and rivets which happened to be in the yards on August 3d, 1917. That is, however, a complete *non-sequitur*.

Obviously the conclusion contended for could not be true unless the interest of the owners consisted of two elements only, (1) the plates in the yard and (2) the contract rights against the builder. There was, however, a third element which often was of far more value than either of the other two and which may be called, following the phraseology of this Court in other cases, "the going value". That element of value in this and every other requisition case arose from the fact that a vast amount of work had been done *in the actual performance of the contract* which was not represented by the plates and rivets which happened to be in the yard on August 3rd, 1917. As mere raw material these parts were of compara-

tively little value but behind their presence in the yard lay the fact that the plans and specifications had been prepared and engines, boilers and auxiliary machinery had all been designed and ordered months before. A steamer ordered, as this one was, long in advance of the requisition, might be ready for the final assembling, with her engines and boilers actually finished by the sub-contractors and ready to ship, and yet you might not find *at the yard* more than 10% of the total material.

It was this element of "going value", this product of the *performance* of the contract which had taken place *outside* of the builder's yard, which the Government most needed and which it was determined to have on August 3, 1917. They wanted ships which, by virtue of previous contracts, were, in every sense of the word, "ships under construction", as to which each part had been designed, ordered and fashioned to fit into its place for the making of an effective whole. Had the Government destroyed all plans and specifications and mixed up all of the engines, boilers, pumps, winches and the thousand and one parts which go to make up a ship and then drawn up original plans and specifications and started anew, our record for ship construction would have been precisely like our record in the construction of aeroplanes upon which we did start when war was declared. It is common knowledge that not one of those ever flew over the German line in actual conflict.

And this "going value" cannot possibly be confused with the value of the contract. That value which arose from the fact that the contract had already been partly *performed*, was a very real and existing thing on August 3, 1917. It is a matter of common knowledge that vast sums of money

were paid to owners who had placed their building contracts in 1916, not for finished ships but for the mere assignment of their contracts and for the benefit of this "going value" which passed with the assignment. The value of the contract was wholly different from the "going value" and was merely the right of the owner to have the *unfinished work* under the contract completed *at the contract price.*

Let us suppose, as was found in this case, that everything necessary to complete a ship had been ordered months before the requisition, and that nothing remained to be done but assemble the parts. If, under those circumstances, the price of labor had doubled since the contract was signed, the value of the contract would have been the difference between the contract price for assembling and the actual cost of doing that work at the higher labor charge.

In other words the value of the contract related to the work *still to be performed* while the "going value" related to that which had been accomplished, no matter where it had been done. The very fact that, in the case at bar, the builder was willing to complete the ship, *even after requisition,* for the unpaid balance of the contract price (Finding IX, Record, p. 16) shows that, at that time, the cost of labor could not have increased greatly and any increase in the price of materials did not count because all material had been contracted for before August 3d.

It may be argued that the present claimant is not entitled to an award for the value of materials taken and the "going value" of the ship under construction because, as already stated, its contract with the Yard did not contain the usual provision that title to hull and materials should

vest in the claimant as the progress payments were made. But while claimant did not have legal title to Hull 193, it nevertheless was, in equity, to be regarded as the owner thereof; and an award of compensation rests upon equitable principles (*supra*, p. 32). Because a ship is considered by the law a chattel of peculiar value, courts of equity will decree specific performance of contracts relating to ships just as readily as of contracts relating to real estate. *Great Lakes Transportation Co.* v. *Scranton Coal Co.*, 239 Fed. 603, and other decisions referred to in appendix (*infra*, pp. 51-53). It is quite clear that if, in the absence of a requisition, the Shipbuilding Company had attempted to dispose of Hull 193 to some other person, the claimant could have secured equitable relief. In substance, the claimant's interest in the Hull amounted to equitable ownership. This consideration is very important here because, as previously stated, the shipowners, on whose behalf this brief is submitted, were all clothed with legal title to the uncompleted hulls and material assembled in the shipyards.

This element of "going value" has frequently been recognized by this and by other courts as one of the elements which must be considered when fixing the value of property taken under the right of eminent domain.

In *City of Omaha* v. *Omaha Water Company*, 218 U. S., 180, the question before this Court was as to the price which the City of Omaha was to pay for the value of a privately owned system of water works which were being taken over by the City. The appraisers allowed the Water Works the sum of over $550,000 for the separate element of "going value". The City contended that this was erroneous on the ground that under the terms of

the Water Company's charter any value on account of the Water Company's unexpired franchise (or contract) was to be excluded. On this point, this court said (pp. 202, 203):

> "The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. *The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant.* The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers. That there is a difference between even the cost of duplication, less depreciation, of the elements making up the water company plant, and the commercial value of the business as a going concern, is evident. Such an allowance was upheld in *National Waterworks* v. *Kansas City,* 62 Fed. Rep. 853, where the opinion was by Mr. Justice Brewer. We can add nothing to the reasoning of the learned Justice, and shall not try to. That case has been approved and followed in *Gloucester Water Co.* v. *Gloucester,* 179 Massachusetts, 365, and *Norwich Gas Co.* v. *City of Norwich,* 76 Connecticut, 565." (Italics ours.)

In *National Water Works* v. *Kansas City,* 62 Fed. 853, which was approved by this Court in the opinion just quoted, the charter of a water company contained the provision that after twenty years the City should purchase the water works, paying for them their "fair and equitable value."

In a proceeding to determine the fair and equitable value, the water company argued that its earnings should be capitalized on a basis of 6%. The contention of the City was, as stated by the court (p. 864):

> "On the other hand, the city insists that the franchise has ceased, and that basing the value upon earnings is in effect valuing a franchise which no longer exists, and which the city is not to pay for; that the true way is to take the value of the pipe, the machinery, and real estate, put together into a waterworks system, as a complete structure, irrespective of any franchise—irrespective of anything which the property earns, or may earn in the future."

Commenting upon whether either of these two theories would result in fixing a "fair and equitable value," the court (by Mr. Justice Brewer) said (p. 865):

> "Capitalization of the earnings will not, because that implies a continuance of earnings, and a continuance of earnings rests upon a franchise to operate the waterworks. The original cost of the construction cannot control, for 'original cost' and 'present value' are not equivalent terms. Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is today. A completed system of water works, such as the company has, without a single

connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn." * * *

"The fact that the company does not own the connections between the pipes in the streets and the buildings—such connections being the property of the individual property owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for, a water works system without a single connection between the pipes in the streets and the buildings adjacent. Such a system would be a dead structure, rather than a living and going business."

See also *Gloucester Water Supply Co.* v. *Gloucester,* 179 Mass. 365 and *Appleton Water Works* v. *Railroad Commission of Wisconsin,* 154 Wis. 121, Ann. Cases 1915 B. 1160, where it was said:

"The value of the plant and business is inherently indivisible, and this latter value is obtained by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them as inseparable parts of a harmonious entity, and exercising the judgment as to the value of that entity. In this way the 'going value' goes into the final result." (Syllabus by the Court.)

The vice in the position adopted by the counsel for the United States is that they have altogether ignored any element of "going value" and have attempted to base the award to the claimant en-

tirely on the "bare bones" value, contending that *everything else* was "contract value" and that this was frustrated by the requisition.

While the Court of Claims avoided this fallacy, it overlooked the fundamental principles involved. While it found that Hull 193 was worth on Aug. 3, 1917, $1,719,400, less the cost of completion, it did not base its decree on these findings, but, instead, awarded the claimant merely a refund of the progress payments.

FOURTH POINT.

Claimant is entitled to compensation for delay in payment, as a part of just compensation, in the form of interest upon the principal sum found due.

It appears by Finding V (rec. p. 10) that this requisition was issued on August 3, 1917, and that no payment was made until February 24, 1920 (Finding XVII, rec. p. 21). Claimant was without its property or any compensation therefor between those dates. Since the latter date, it has been without its property and has had only partial compensation therefor, less even than the sum allowed by the Court of Claims and very much less than the value of the contract as now claimed.

The Court of Claims (Conclusion of Law, rec. p. 22) allowed interest on the sums unpaid, upon the authority of this Court in *Seaboard Airline Ry.* v. *United States,* 261 U. S. 299.

Defendant asserts error upon the authority of *United States* v. *North American Co.,* 253 U. S. 330, under the provisions of Sec. 177 of the Judi-

cial Code (formerly Rev. Stat., Sec. 1091), declaring:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

In *Seaboard Airline Ry.* v. *United States*, 261 U. S. 299, the property was taken under a war requisition under act of August 10, 1917, Ch. 53, Sec. 10, 40 Stat. 276, allowing proceedings for recovery of just compensation in the United States District Courts. There was no express provision for interest. This court there said (pp. 304-305):

> "The owner's right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. * * *
>
> "In support of its contention the Government cites *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330. That was a suit in the Court of Claims based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it adopted by the conformity provisions."

The case of *United States* v. *Rogers,* 255 U. S. 163, was then quoted to sustain these principles, as follows, p. 306:

> "Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property."

The Court then concluded, p. 306:

> "The rule above referred to, that in the absence of agreement to pay or statute allowing it the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. *The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.* Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. * * *
>
> "The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled" (italics ours).

The same rule was followed in *United States* v. *Benedict,* 261 U. S. 294, 298, affirming 280 Fed. 76. See also *Prince Line* v. *United States,* 283 Fed. 535, 541. The reason was well stated by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Benedict,* 280 Fed. 80, as follows:

"It is certain that the national immunity from payment of interest does not extend to condemnation proceedings. *United States* v. *Rogers*, 257 Fed. 397; *United States* v. *Highsmith*, 257 Fed. 401, affirmed 255 U. S. 170. Since, therefore, just compensation *by definition* includes interest (cf. *Agency, etc., Co.* v. *American, etc., Co.*, 258 Fed. 363, 369) and this statutory method of arriving at compensation is analogous to condemnation proceedings, we are of opinion that the statutory rate prevailing in New York was rightfully allowed. No error is discovered upon the writ of the United States." (Italics ours.)

See also

Appleton Water Works v. *Railroad Comm. of Wisconsin, supra*, p. 43.

In *United States* v. *New York*, 160 U. S. 598, this court affirmed the judgment of the Court of Claims allowing interest as a part of "costs, charges and expenses" reimbursible by statute to a State, p. 621. This court there said, p. 621:

"We can not doubt that the interest paid by the State on its bonds, issued to raise money for the purposes expressed by Congress, constituted a part of the costs, charges, and expenses properly incurred by it for those objects. Such interest, when paid, became a principal sum, as between the State and the United States, that is, became a part of the aggregate sum properly paid by the State for the United States. The principal and interest, so paid, constitutes a debt from the United States to the State. It is as if the United States had itself borrowed the money, through the agency of the State. We therefore hold that the court below did not err in adjudging that the $91,320.84 paid by the State for interest upon its bonds issued in 1861 to defray the expenses to be incurred in

raising troops for the national defence was a principal sum which the United States agreed to pay, and not interest within the meaning of the rule prohibiting the allowance of interest accruing upon claims against the United States prior to the rendition of judgment thereon."

During the war, many statutes were passed for condemnation of private property beside the act of June 15, 1917, here involved, *ante*, p. 3, and of August 10, 1917, discussed in the *Seaboard* case. Some of these gave jurisdiction to allow "just compensation" to the United States District Courts, others to the Court of Claims, and still others to both courts concurrently, as shown in the footnote.*

It is not conceivable that Congress intended to give interest to the first class and not to the second and to leave it dependent in the last class to the amount involved or to the accident of selection of the tribunal.

**District Courts alone:*

August 10, 1917, Ch. 53, Sec. 10, 40 Stat. 276.

Courts of Claims alone:

October 6, 1917, Ch. 25, 40 Stat. 394.
July 1, 1918, Ch. 114, 40 Stat. 705.

Court of Claims and concurrently in the District Courts to the amount of $10,000, specified by Sec. 24, par. 20, Judicial Code:

March 4, 1917, Ch. 180, 39 Stat. 1193;
June 15, 1917, Ch. 29, 40 Stat. 183;
August 10, 1917, Ch. 53, Sec. 12, 40 Stat. 279;
August 10, 1917, Ch, 53, Sec. 16, 40 Stat. 282;
August 10, 1917, Ch. 53, Sec. 25, 40 Stat. 285;
October 6, 1917, Ch. 79, 40 Stat. 371;
July 1, 1918, Ch. 114, 40 Stat. 720;
July 1, 1918, Ch. 114, 40 Stat. 738.

The jurisdiction of the Court of Claims before these statutes for the recovery of property taken was (as pointed out in the extract from the opinion in *Seaboard Airline Ry.* v. *United States,* quoted *ante,* p. 45) under implied promise and not under condemnation. The grant of jurisdiction by these statutes was of a new character.

"Just compensation," as has been stated again and again, includes the payment of interest, or its equivalent, for delay. Section 177, *supra,* may be reconciled with this by holding that proceedings to recover "just compensation" are contractual in nature and that the use of a term which "by definition," includes interest is equivalent to an express stipulation therefor. But if Section 177 is in conflict with the later acts they repeal that section so far as suits brought under those acts are concerned. In other words the case at bar is brought under a statute the terms of which require payment of interest, or its equivalent, under the present circumstances. General statutory provisions which are at variance with the Act under which suit is brought must, of course, yield to that Act.

Furthermore, since "just compensation," including interest, is a constitutional right, the statute must be so construed as to allow interest, if its validity is to be upheld. The statute is not to be interpreted, by construing it with another statute, as unconstitutional, if, when read alone, it is constitutional.

Conclusion.

For the foregoing reasons, it is submitted that in No. 367 the judgment below should be reversed and the Court directed to enter judgment for the value of the contract on August 3, 1917, and in No. 385 the judgment allowing interest as a measure of just compensation should be sustained.

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APPENDIX.

The appellant was in equity the owner of Hull 193.

The fact that the appellant was in equity owner of the hull is made clear by the fact that a court of equity would have restrained the shipbuilder if it had attempted to sell or otherwise dispose of the hull; and such a court might have required the shipbuilder to perform its contract (assuming, of course, that there had been no requisition by the United States.)

In *Great Lakes Transportation Co.* v. *Scranton Coal Co.*, 239 Fed. 603 (C. C. A. 7th Circuit, 1917), the Transportation Company had agreed to employ nine steamers owned by it in the carriage of coal for the Coal Company for the season of navigation on the Great Lakes, for the years 1916, 1917, and 1918. During the period of performance of the contract, the Transportation Company sold the boats to its vice-president and director, and it was threatened that the contract would not be carried out, but that the boats would be employed in carrying cargoes to Europe which was more remunerative at that time. It was held that the Coal Company had such an interest in the steamers that a decree of specific performance would be granted, even though the rights of a purchaser were involved. The Court said:

> "If specific performance be otherwise proper, equity is no longer deterred from granting its aid because of a so-called lack of mutuality in the remedy. It suffices that defendant's compulsory performance is conditioned upon plaintiff's continued readiness to carry out his obligation. Montgomery Traction Co. *v.* Montgomery Light & Water Co., 229 Fed. 672,

144 C. C. A. 82; Ames Lectures on Legal History, p. 376. See, too, Guffey *v.* Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856.

That Pratt had purchased the boats, and contracted to re-sell them just before this suit was brought, will not defeat plaintiff. Pratt had been the Transportation Company's vice-president and director; at the time of the alleged purchase, he was its principal stockholder; he had full knowledge of the contract, and of plaintiff's claim. He can be fully protected as against the company or any other stockholders for the money paid by him to secure the discharge of the mortgage on the boats or given to the company on account of the purchase price. His knowledge of the entire situation subordinates him as owner to plaintiff's *prior equitable right* to specific performance." (239 Fed. at p. 609.)

While a ship is personalty, nevertheless it is considered as a chattel of peculiar value, and a Court of Equity will grant specific performance of a contract for the sale of a ship—from which follows the corollary that the purchase becomes invested with the equitable title from the moment the contract becomes binding, just as in the parallel case of a purchase of real estate.

In *Menier* v. *Donald,* 165 N. Y. Supp., 50, 98 Misc. 684 (February, 1917), it was held that a Court of Equity would compel the specific performance of a contract for the purchase of a steamer, the Court saying:

"There is authority, both in this country and in England, for the proposition that a ship is a special kind of personal property, which in itself may justify a court of equity in decreeing specific performance. *Lynn* v. *Chaters,* 2 Keen. 521; *Claringbould* v. *Curtis,* 21 L. J. Ch. (N. S.) 541; *Hart* v. *Herwig,* L. R. (8 Ch. Div. 860; *Hurd* v. *Groch,* 51 Atl. Rep. 278 (N. J.); *Clark* v. *Flint,* 39 Mass. 231; 36

> Cyc. 558. But even if this were not so, I think the allegations of the complaint as to the special and peculiar value of this ship to the plaintiff and the difficulty of replacing it or determining its value and his damages under present (war) conditions are amply sufficient to sustain the complaint against demurrer."

And the rule is well settled that even a charter-party,—that is, a mere hiring—will always be specifically enforced at least to the extent that the charterer may have a decree forbidding the owner to employ the vessel in a way inconsistent with the charter.

In *De Mattos* v. *Gibson,* 4 De Gex and Jones, 276 (1859), Lord Chelmsford said:

> "A person who hires a vessel under a charterparty does so not merely from a wish to have his goods conveyed to a particular place, but upon a careful choice of the vessel itself as best adapted for his purposes. * * * I think that a vessel engaged under a charterparty ought to be regarded as a chattel of a *peculiar value* to the charterer, and that although a court of equity cannot compel a specific performance of the contract which it contains, yet that it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden, according to the principle so fully expressed in the case of *Lumley* v. *Wagner.*" (4 De Gex & Jones, 276, p. 298.)

To the same effect are *Sevin* v. *Deslandes,* 30 L. J., N. S., Ch. 457; *Messageries Imperiales* v. *Baines,* 7 L. T. N. S., 763; *Collins* v *Lamport,* 34 L. J. Ch. 196; Carver on Carriage by Sea, 6th Ed., sec. 39, page 54; Maclachlan on Merchant Shipping, 5th Ed., page 404; also the recent decision in the Court of Appeal in *Furness, Withy & Co.* v. *Larsen,* Vol. 2, Lloyd's List Law Rep. 557 (March, 1920).

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No. 385. October Term, 1923.

IN THE

Supreme Court of the United States.

THE UNITED STATES,
Appellant,

v.

BROOKS-SCANLON CORPORATION.

Brief in Favor of Allowance of Interest as a Part of Just Compensation in Commandeering Cases.

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IN THE

Supreme Court of the United States.

October Term, 1923. No. 385.

THE UNITED STATES,
Appellant,

v.

BROOKS-SCANLON CORPORATION.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN FAVOR OF ALLOWANCE OF INTEREST AS A PART OF JUST COMPENSATION IN COMMANDEERING CASES.

STATEMENT OF QUESTION INVOLVED.

Does Section 177 of the Judicial Code forbidding the payment of "interest" in cases in the Court of Claims until after judgment is rendered, prevent the awarding, in commandeering cases, of a sum, measured by the legal rate of interest, as part of the just compensation to which the citizen is entitled under the Fifth Amendment?

ARGUMENT.

We contend:

I. THE CLAIM IS "FOUNDED UPON THE CONSTITUTION OF THE UNITED STATES" AND A "LAW OF CONGRESS", (Judicial Code, Section 145), SUCH "LAW OF CONGRESS" BEING THE ACT OF JUNE 15, 1917, AND HENCE SECTION 177 OF THE JUDICIAL CODE IS INAPPLICABLE.

II. IN COMMANDEERING CASES JUST COMPENSATION REQUIRES THAT THE CITIZEN BE MADE WHOLE AS OF THE DATE OF THE TAKING.

III. WHEN PAYMENT IS DELAYED THE CITIZEN CAN BE GIVEN JUST COMPENSATION IN NO OTHER WAY THAN BY AN ALLOWANCE FOR THE DELAY IN PAYMENT.

IV. INTEREST IN JUST COMPENSATION CASES IS ALLOWED, NOT AS INTEREST, BUT AS "DAMAGES FOR DETENTION" IN ORDER THAT THE CITIZEN MAY BE GIVEN THE FULL EQUIVALENT OF THE PROPERTY COMMANDEERED AS OF THE DATE OF ITS REQUISITION.

V. THE RIGHT TO JUST COMPENSATION BEING FIXED BY THE CONSTITUTION, IT CANNOT BE LIMITED, QUALIFIED, OR TAKEN AWAY BY CONGRESS.

VI. ACTS OF CONGRESS MUST BE SO CONSTRUED, IF POSSIBLE, AS NOT TO CONFLICT WITH THE CONSTITUTION.

VII. SINCE AN EFFORT TO DENY OR LIMIT THE RIGHT TO FULL JUST COMPENSATION, INCLUDING DAMAGES FOR DETENTION, WOULD BE BEYOND THE POWER OF CONGRESS, IT WOULD BE PRESUMED THAT CONGRESS HAD NO SUCH INTENT.

VIII. IN FORBIDDING THE PAYMENT OF INTEREST IN CASES IN THE COURT OF CLAIMS UNTIL AFTER JUDGMENT IS RECOVERED, CONGRESS MUST HAVE HAD IN MIND CONTRACT CASES AND NOT EMINENT DOMAIN OR COMMANDEERING, SINCE, IN THE LATTER, INTEREST IS NOT ALLOWED AS INTEREST AND SINCE IT WOULD BE BEYOND THE POWER OF CONGRESS TO LIMIT A CONSTITUTIONAL RIGHT.

I. The Claim is "Founded Upon the Constitution of the United States" and a "Law of Congress" (Judicial Code, Section 145), Such "Law of Congress" Being the Act of June 15, 1917, and Hence Section 177 of the Judicial Code is Inapplicable.

Section 145 of the Judicial Code reads as follows:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> (1) First. All claims (except for pensions) *founded upon the Constitution of the United States or any law of Congress* . . . "

The Act of June 15, 1917, provides as follows:

> " . . . it shall make just compensation therefor to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid 75% . . . *and shall be entitled to sue the United States to recover* such further sum as . . . will make up . . . *just compensation* . . . in the manner provided for by Section 24, paragraph 30, and Section 145 of the Judicial Code."

The case is therefore wholly unlike

> United States v. North American, etc., Co., 253 U. S. 330 (1919),

which was based on an implied promise of the United States to pay for property appropriated by it.

This distinction was pointed out in

> Seaboard Air Line v. U. S., 261 U. S. 299 (1923),

an action under the Lever Act (40 Statutes-at-large, 276), which, (Section 10) authorized the claimant

> "to sue the United States to recover such further sum as . . . will make up . . . just compensation . . . "

Mr. Justice Butler said:

> "*The owner's right does not depend on contract, express or implied. A promise to pay is not necessary.* None is alleged. *This suit is part of the authorized procedure initiated by the United States* for the condemnation of the land. *The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. . . . The only question here is whether payment at a subsequent date of the value of the land as of the date of taking possession is sufficient to constitute just compensation.*"

Of the North American Transportation & Trading Co. case, *supra*, it was said:

> "That was a suit in the Court of Claims, *based on an implied promise* of the United States to pay for property appropriated by it. . . . "

Since the claim in the case at bar is not based upon an implied promise but is founded upon the Constitution of the United States and a law of Congress in pursuance thereof, the North American case is inapplicable and the claimant is entitled to the full measure of just compensation guaranteed by the Constitution.

The following jurisprudence has been definitely established:

(a) The citizen is entitled to be made whole for goods commandeered.

(b) The just compensation guaranteed by the Constitution must be paid as of the date of the taking.

(c) Hence, the damages for detention (or interest) must be included in the award.

(d) Any other decision would have been contrary to common honesty. Market price, being the measure of just compensation:

> United States v. New River Collieries Co., 262 U. S. 341 (1923);

the citizen could have obtained cash in the market. The use of money has a well-known value. By the act of commandeering the citizen is deprived of the use of his money. Unless he is compensated therefor he does not receive the true measure of compensation to which he is entitled under the Constitution.

(e) In eminent domain cases, in which the Government is obliged to bring legal proceedings in order to obtain title, the right to interest is clear and undoubted.

> United States v. Rogers, 225 U. S. 163 (1921);
>
> Seaboard Air Line Railway Co. v. U. S., 261 U. S. 299 (1923);
>
> Brown v. U. S., Adv. Ops. 1923-1924, p. 104, decided November 12, 1923.

Yet in such cases there is merely the fiction of an immediate market value, ascertained by expert testi-

mony, as aginst the *fact* of actual market value in cases of commandeering of personal property. The reason for the rule exists *a fortiori* in the case of goods readily salable in an open market.

With the greatest respect, it is submitted that the distinction in

> United States v. North American, etc. Company, 253 U. S. 330 (1919),

as between eminent domain cases and commandeering cases, ignores the question of constitutional law involved and emphasizes *procedure* as against *substance*.

In eminent domain, as in commandeering, the substance of the right arises out of the Fifth Amendment. Government has no power to take except upon payment of just compensation. Government is under a duty to pay just compensation in full. Government has no right to pay less than just compensation:

> Monongahela Navigation Co. v. U. S., 148 U. S. 312 (1893).

The mandate is laid upon every department of the Government. The case is one of the rare ones in which it can be demonstrated mathematically that only one decision is possible without violating a plain constitutional right.

That plain constitutional right is to be paid in full *as of the date of the taking*. Any conclusion by which the citizen is forced to give up his property for public use and is obliged to receive less than just compensation involves a palpable violation of his constitutional right.

To say that the citizen whose real estate is taken must be made whole as of the date of the taking, but that the citizen whose goods are taken need not be, would be to make a laughing stock of the Constitution.

To say that the citizen whose goods are taken and to whom Congress gives the right to sue in the District Court is entitled to be made whole as of the date of the taking, and that the citizen who must sue in the Court of Claims cannot be made whole as of the date of the taking, would be to make the law ridiculous.

No citizen whose property is taken under such circumstances will ever be able to understand how Congress can defeat his constitutional right by giving jurisdiction to the Court of Claims rather than to the District Court.

The citizen will always regard and will rightly regard *his right in such cases as being based on the bed-rock of the Constitution.* He will believe that the Constitution should operate in an equal way in respect of real as well as personal property, and should apply to proceedings in the Court of Claims as well as in other courts.

If Congress had attempted by plain words to enact that the Court of Claims should have jurisdiction in commandeering cases and that the recovery should be ninety per cent. of the market value, this court would sustain the general jurisdiction of the Court of Claims and would strike down the unconstitutional proviso.

If Congress, by the express terms of an act, had conferred jurisdiction on the Court of Claims in commandeering cases and had added the proviso "provided that in such cases no allowance for damages for detention, or interest, shall be made until after the rendition of judgment," this court, comparing the Constitution with the proviso, would sustain the Constitution as against the portion of the act repugnant to the Constitution.

In essence the case at bar is precisely the same, so far as concerns the conclusion reached. In the instances given, the Court would be required to strike down portions of an act plainly repugnant to the Constitution. In the case at bar the Government is asking this court to assume that Congress intended by indirection and by inference to override the Constitution.

There is no real evidence that Congress so intended. The words of Section 177 of the Judicial Code have a proper legal meaning limited to interest *qua* interest. Damages for detention may be measured by interest, but such damages are, in fact, not the same as interest.

> U. S. v. Rogers, 255 U. S. 163, 169 (1921);
> Seaboard Air Line Railway Co. v. U. S., 261 U. S. 299, 306 (1923).

We respectfully submit that the decision in United States v. North American Company is made to turn upon a plain error, which may be said to be an error of fact; namely, that the right of action is not upon the Fifth Amendment. We submit, as a matter of fact, that the right of action *is* upon the Fifth Amendment. The fact is that no contractual relation exists between the Government and the citizen when the Government says, "Willy nilly, you must hand over your property for Government use."

It is a fiction to say that there is an implied contract to pay. And a fiction should never be permitted to work injustice:

> 25 C. J. 1086;
> U. S. v. 1960 Bags of Coffee, 8 Cranch. (U. S.) 398, 415,

much less override the Constitution. The fact is, not an implied contract, but an express obligation imposed

by the supreme law. Any construction of the existing acts of Congress which would fail to find therein ample authority in an existing court to make awards in accordance with the obligation imposed by the supreme law, would imply that Congress has been derelict in its duty for nearly a century and a half.

The manner in which and the court in which the citizen's right to enforce the Government's obligation to pay just compensation may be asserted, are matters *purely procedural*. It borders on the fantastic to suggest that a question of procedure as to whether one court of the United States or another court of the United States has jurisdiction can affect the substance of a right guaranteed by the Constitution. *In one court of the United States the citizen is entitled to the full measure of compensation guaranteed by the Constitution. In another court of the United States he is not entitled to receive the full measure of such just compensation!* And the Government seeks to reach this amazing conclusion under general phraseology which the Court of Claims has rightly held was not intended by Congress to deprive that court of power to render the same measure of equal and exact justice to which citizens are entitled in other courts of the United States.

II. In Commandeering Cases Just Compensation Requires That the Citizen Be Made Whole as of the Date of the Taking.

In the language of Mr. Justice Brewer, in Monongahela Navigation Co. v. U. S., 148 U. S. 312 (1892), when the Federal Government condemns private property for a public purpose, the compensation to the owner "*must be a full and perfect equivalent for the property taken.*"

See also:

Seaboard Air Line Railway Co. v. U. S., 261 U. S. 299 (1923);

U. S. v. New River Collieries Company, 262 U. S. 341 (1923).

III. When Payment Is Delayed the Citizen Can Be Given Just Compensation In No Other Way Than by an Allowance for the Delay in Payment.

How else can the owner be put "*in as good condition pecuniarily as he would have been if the property had not been taken*" (U. S. v. Town of Nahant, 153 Fed. 520 (1907), if he is not awarded damages for delay in paying to him the just compensation to which he is entitled?

In U. S. v. First National Bank, 250 Fed. 299 (1918), in his instructions to the commissioners appointed to assess damages sustained by the owners of land taken by the United States for a military camp, Clayton, District Judge, said, page 301:

> "The sole question for you to determine, in each one of the cases, is the value of the lands and the property at the time of the actual taking and occupation by the United States, *together with interest at the rate of 8 per centum per annum, the legal rate in Alabama, on said sums so ascertained by you, from the date of such actual taking and occupation.*"

IV. Interest In Just Compensation Cases Is Allowed, Not as Interest, But as "Damages for Detention" In Order That the Citizen May Be Given the Full Equivalent of the Property Commandeered as of the Date of the Requisition.

It must be constantly borne in mind that this is not an attempt to recover "interest" from the United States. It may be conceded as a general proposition that "interest" is not recoverable against the United States on unpaid "accounts" or "claims," such as are found to be due to individuals upon the settlement of accounts with its officers and agents.

But even in those cases wherein "interest" on claims against the United States was not allowed, a right to recover "damages," which may be measured by the legal rate, is recognized.

In the case at bar, damages measured by the legal rate of interest are guaranteed to this claimant by the provision of a higher authority than that of an act of Congress, to wit, the Constitution of the United States, in the Fifth Amendment. As has been illustrated, *supra,* the "just compensation therein provided for has been judicially determined to be that which would place the property owner in as good position pecuniarily as he would have been if his property had not been taken."

See:

Shoemaker v. U. S., 147 U. S. 282, 320 (1893);

U. S. v. Rogers, 257 Fed. 397 (1919);

Seaboard Air Line Railway Co. v. U. S., 261 U. S. 299 (1923).

The decision in U. S. v. Rogers was affirmed by the United States Supreme Court in 255 U. S. 163, where Mr. Justice Day, speaking for this Court, said, page 169:

"Having taken the lands of the defendants-in-error, it was the duty of the Government, to make

just compensation as of the time when the owners were deprived of their property, Monongahela Navigation Company v. United States, 148 U. S. 312, 341.

. . . . . .

". . . We agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled."

In the case of Seaboard Air Line v. U. S., *supra*, this Court said, at page 306, per Butler, *J.*:

> "The rule above referred to, that in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. *The requirement that 'just compensation' shall be paid is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.* Where the United States condemns and takes possession of land before ascertaining or paying compensation the owner is not limited to the value of the property at the time of the taking; *he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.*"

In like manner the claim in the case at bar is for damages arising from the failure to pay claimant just compensation for its property *on the dates of the actual taking thereof from its possession by the United States.* At those respective times *claimant should have been paid just compensation,* and the inconveniences to which it has been subjected by the delay must be considered and allowed for, at the rate of 6 per centum per annum on the market value of its property at those dates.

V. The Right to Just Compensation Being Fixed by the Constitution, Cannot Be Limited, Qualified, or Taken Away by Congress.

As was said by Mr. Justice Butler, in the case of Seaboard Air Line Railway Company v. United States, *supra:*

> "Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. *Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute.*"

VI. Acts of Congress Must Be So Construed, If Possible, as Not to Conflict with the Constitution.

It is, of course, hornbook law that a statute, when reasonably possible, must be so construed as to uphold its validity.

> "Indeed, a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score . . . If a statute is susceptible of two constructions, one of which will render it constitutional, and the other unconstitutional, it is the duty of the Court to adopt that construction which, without doing violence to the fair meaning of the language, will render it valid."

12 C. J., pp. 787-788;

Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531 (1914);

United States v. Delaware & Hudson Co., 231 U. S. 366 (1909).

VII. Since an Effort to Deny or Limit the Right to Full Just Compensation, Including Damages for Detention, Would Be Beyond the Power of Congress, It Would Be Presumed That Congress Had No Such Intent.

In Pennsylvania Coal Co. v. United States, *supra*, after stating the rule quoted above, the Court, per Pitney, *J.*, went on to say, at page 546:

> ". . . there being a strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority."

VIII. In Forbidding the Payment of Interest in Cases in the Court of Claims Until After Judgment is Recovered, Congress Must Have Had in Mind Contract Cases and Not Eminent Domain or Commandeering, Since in the Latter Interest is not Allowed as Interest, and Since It Would Be Beyond the Power of Congress to Limit a Constitutional Right.

It is true that Section 177 of the Judicial Code provides as follows:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

But, as we have already seen, interest in just compensation cases is allowed, not as interest, but as part of the just compensation to which the owner is entitled under the Constitution. As was said in the concluding remarks of the Court in the case of Seaboard Air Line v. United States, at page 306:

> "The addition of interest . . . is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

The prohibition of the Judicial Code cannot apply, then, to a case of eminent domain or commandeering.

In the case of United States v. New York, 160 U. S. 598, 622 (1895), it was held that the collection of an amount, measured by interest, is not prohibited by the statute limiting the powers of the Court of Claims or by the common law rule which exempts the sovereign from liability to pay interest.

An intent by Congress to deprive the citizen in eminent domain and commandeering cases of his constitutional right to just compensation, by forbidding the award of interest cannot be presumed, since to do so would render the statute unconstitutional and void.

The Court of Claims was clearly right in ignoring the inapplicable provisions of section 177, and in deciding that interest must necessarily be allowed as an integral part of the just compensation guaranteed by the Fifth Amendment.

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